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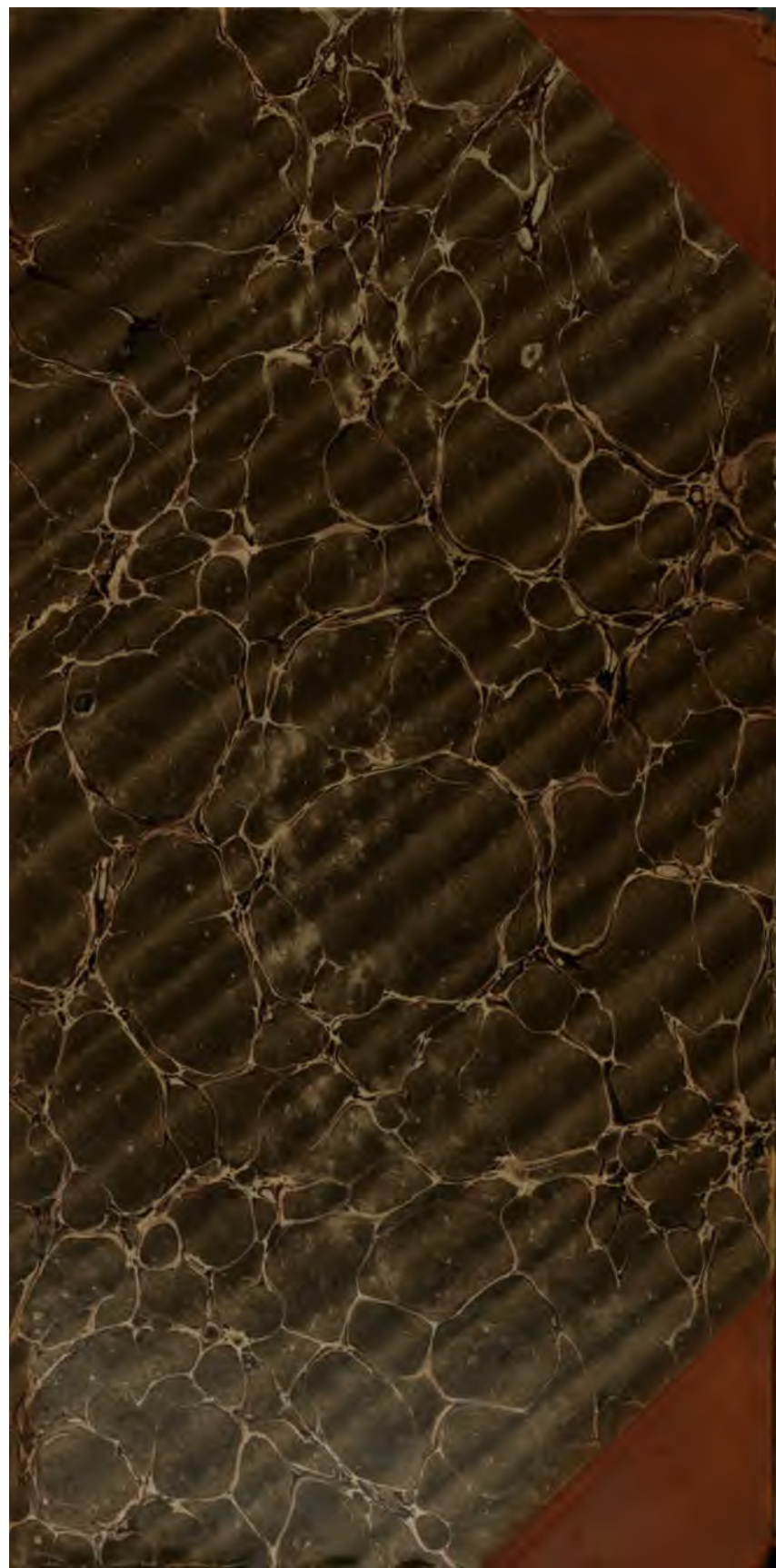
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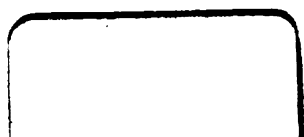
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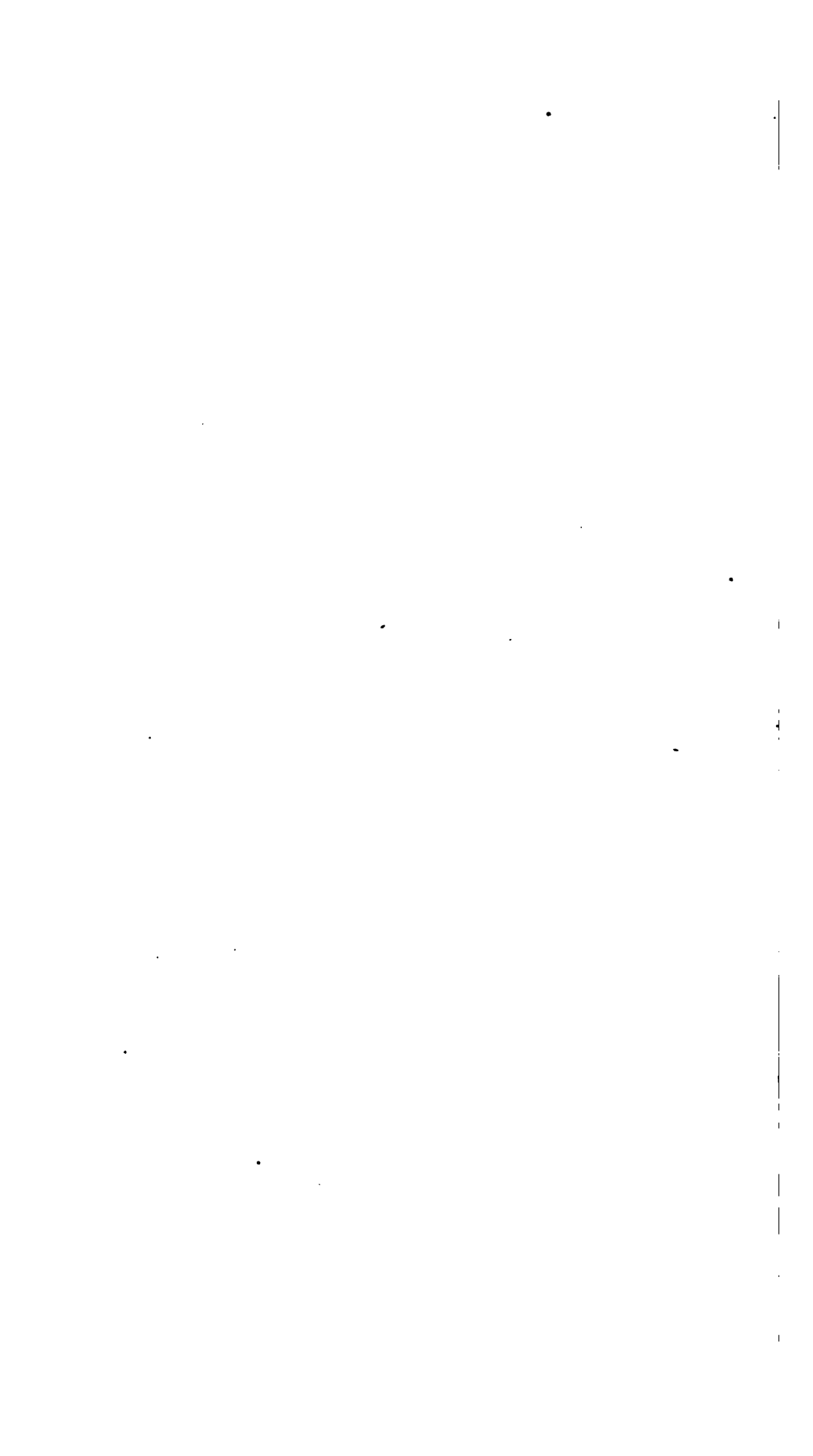












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THE

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PAPERS OF THE SCOTTISH LAW AMENDMENT SOCIETY.*

THE LORD-ADVOCATE'S ADDRESS AS PRESIDENT, NOV. 29, 1869.

It is my duty and privilege to address you on this occasion from the chair which, by your favour, I am permitted to occupy. In considering how I might most profitably discharge this duty and exercise this privilege, I have turned my attention to various subjects which have occupied my own thoughts and those of others who take an interest in the amendment of our laws, not theoretical merely, but practical, and with a desire to lend a hand in furthering the good work. It has been a question with me whether it would be more expedient to confine myself to one subject which I might attempt to deal with exhaustively, or to take notice of several subjects, with the necessity of treating each more superficially and briefly. I have chosen the latter course, as more suitable to the occasion. As matter of necessity, however, I must limit the range of subjects; and, obeying this necessary law, I propose to confine myself to real property, and to advert only to a few subjects immediately relating to it, upon which it seems to me that the law may be amended.

At the outset, I deem it prudent and becoming to state explicitly that, in what I have to say to you, I do not speak as a member of the Government, and am not to be held as announcing any intentions on my part in that capacity. I shall speak only as a member of this Society; and, while I shall not seek to conceal my opinions on the several subjects which I have to bring under your notice, it is not to

* The papers selected for publication by the Council of this Society will, by arrangement, be published in the *Journal of Jurisprudence*; but the Society is not to be understood as becoming in any sense responsible for the other contents of the *Journal*; and the conductors of the *Journal* do not assume any responsibility for the style or opinions of the Papers of the Scottish Law Amendment Society.

be understood that I give any pledge or at all commit myself respecting the expediency or possibility of legislative action at any particular time or in any particular manner. There is another observation of a general and preliminary character which I desire to make and to commend to your special attention as a society of law reformers. It is this, that the first and indispensable condition to the just consideration of any question of law reform is, that every selfish suggestion shall be conscientiously and resolutely rejected, and that each for himself shall be watchfully on his guard against the bias and prompting of individual and professional interest. It is a hard condition to observe, and it is not matter of wonder that it should often be violated both consciously and unconsciously. It is so natural, with reference to any proposal, for every man to think how he will be individually affected by it, or what influence it will have on the prosperity of the professional body to which he belongs, that it requires an effort of will, and a submission to conscience of no ordinary character, to reject the thought, and concentrate the attention on the true merits of the question as it affects the general good of the whole community. Further, the mind is very subtle in its endeavours to reconcile the public good with individual or class interests, and this subtlety, unless we earnestly guard against it, is sure to lead us wrong. To a large extent, the thoughts and resulting influences to which I allude are short-sighted, the true eventual interest of the individual or the class being really in harmony with that of the general public. At the same time, it is impossible to deny that the general good, which it is the object of every sincere law reformer to promote, not unfrequently requires that individual and professional interests shall be sacrificed; and he who is not ready to make the sacrifice is but a lukewarm member of this or any similar society. If any one would realise the extent and pernicious operation of the narrow and selfish interests against which I seek to guard all who would aid the good work which we wish to further, let him consider the vast variety of the views and suggestions which are put forward and advocated with reference to any subject on which a reform is proposed, and endeavouring honestly and intelligently to trace them to their sources, let him notice how each individual stream is coloured—in some instances I might say polluted—according to the character of the spring from which it issues. It is the same everywhere; class interests, more or less disguised, will assert themselves, and it is impossible to over-estimate their power as obstacles to even manifestly desirable reforms. They are not the less but the more obstinate and

mischievous when, as frequently happens, those who are really under their influence have succeeded in persuading themselves, and indeed quite believe, that they are not. Of the particular subjects which I intend briefly to notice, I begin with the law which governs titles to land in this country.

Our system of land rights is, I need hardly observe in this place, very old and very artificial. Modern good sense has abolished or modified some of its absurdities, which, even in our own times, were held in reverence; but in the main the system stands as it did in remote ages, when the condition of the country and the genius, pursuits, and habits of the people were very different from what they are now. It would, of course, be foolish to take exception to it merely because it is old; and if it serve its purpose in these days, it is nothing against it, but the reverse, that it was also found to answer in the days of our forefathers. Further, if it occasion no practical grievances of a serious character, I for one would not be disposed to meddle with it only because it is deformed (as we in these days may think) by some quaint ornamentations of a superfluous character which the taste of our ancestors approved. But the charges which thoughtful men have for a long time made and are now beginning somewhat more earnestly to press against the system, are of a more serious character than that it is old and harmlessly absurd. They say that it is cumbrous, and that, so far from being necessary or conducive to the security of title, it really occasions the only dangers to title with which in these days we are practically acquainted, or which we have reason to apprehend. They also say that it is attended with very unnecessary expense. The subject is peculiar, or seems to me to be so, in this respect, that those who suffer from the grievances connected with it (assuming that they are real, as I think they are to a great extent) are not so clamorous for a remedy as most other sufferers from an objectionable law. It is not, I think, difficult to assign reasons for this—the chief reason probably being that the subject itself is a mystery to all except professional lawyers, and that those of the public who are so fortunate as to possess land do not know how it comes to pass that their titles are so voluminous and expensive, and find it impossible to understand the defects and flaws which require the conveyancer's skilled assistance or lead to litigation. A proprietor generally knows no more than this—that he has his lawyer's assurance that his title has been made all right at a certain necessary cost, and that the deeds are in his charter-chest. An heir

succeeding only knows that he has to pay so much for making up his title; but he knows absolutely nothing of what it consists. A purchaser is in the same position. Permit me to invite your intelligent and skilled attention to these questions:—Is the system right? Is it necessary, and, if not necessary, is it expedient that the feudal system shall continue to exist? Is it possible, and, if possible, is it not desirable, to assimilate land to other subjects of property with respect to the evidence of the proprietor's title and (which is really the same question) the mode of transmission? My observations at present on this great and interesting subject must of necessity be brief and general. But, although I cannot now submit to you all the grounds of it, I have no hesitation in stating it as my opinion—the result of frequent and careful consideration—that the feudal system may be altogether abolished with advantage to the whole community, and that superiorities may be made to cease without sacrificing any of the substantial patrimonial rights of those who are now called superiors. It is probably known to many of you that this was the opinion of one of the most skilled adepts of our day in the mystery of Scotch Conveyancing, I mean the late Lord Curriehill. I have never heard what I thought to be even a plausible reason assigned for maintaining the relation of superior and vassal. It is assuredly not necessary to enable a proprietor to sell land subject to an annual payment, or to secure the stipulated payment. It is not necessary to the security of title; on the contrary, it leads only to danger by the multiplicity of deeds which it requires. When a proprietor dies, and is succeeded by his son, why should the son be under the necessity, as he is now, of taking a charter from a superior? or, as frequently happens, when the estate consists of several parts acquired at different times, a dozen charters from a dozen superiors? Why should the heir not be allowed to enter upon and possess the estate upon his dead father's title? When an estate descends to an heir, or is acquired by a purchaser, does any one believe that there would not be sufficient safety in such a simple rule as this—that the ancestor's title shall be imputed to the heir, and the seller's to the purchaser? I am not, of course, to be understood as suggesting that the ordinary evidence shall not be required of the heir's right and the purchaser's acquisition. But why should the subject of title be complicated with a consideration of superiorities? The difficulties and dangers connected with the examination and completion of a progress of titles do not consist in tracing direct transmissions of the *dominium utile*, but in noticing the creation of mid-

superiorities, often accidental and unobserved, and seeing that they have been or shall be duly evacuated and sopited by the appropriate charters by progress. The skill, anxiety, and expense thus required in order to conform to feudal rules in themselves absolutely useless, are very great. Further, on this subject I should be prepared to advocate the abolition of all rules of formal title which interfere with the reasonable and natural consequences of substantial right. Let me instance a case of such interference, which must, I should think, seem absurd to any one whose good sense is not obscured by his familiarity with the technical rule that leads to it. A man succeeds as heir to an estate. If he make up a title, he may dispose of it by deed; and, failing that, it will descend on his death to his heir. But should he chance to die before his title is made up, the estate will not pass by his deed or transmit to his heir, but will go to the heir of the last proprietor infest.

Another topic connected with this subject, on which I should desire to offer a few observations, relates to our system of registering deeds for publication. We have been accustomed to hear such unqualified praise of this system, that I am almost afraid to say that I regard it as very unnecessarily and inconveniently ponderous. But it is a subject on which I should desire to know the views and opinions of those who have a more intimate practical acquaintance with it than I have. Is it really necessary that every deed of conveyance and security should be recorded at length, or at such length as is now required? Would a register not serve its purpose if it contained only such short notices as would put people on their inquiry? In order to publish the fact that, of a certain date, A conveyed a certain estate to B, or granted him a security over it for £1000, is it necessary to record the deeds at length? In the reasonable, convenient, and sufficiently safe course of business in ordinary life, information is not communicated in this verbose fashion. If you required to inform a man that A had conveyed his house to B, or given him a security on it for £1000, you would not, I should think, deem it necessary to send him a copy of the deed in either case, but would simply state the fact you wished him to know. A full copy of the deed, no doubt, avoids all risk of misrepresentation; but is it worth the pains, or is it not rather a superfluous and inconvenient way of giving notice of a simple fact? But the purpose of a register is really only to give notice to all whom it may concern. Before transacting, they can see the deeds themselves, and I suppose

generally do so, even although they are recorded at length. The result of the present system is a vast and daily increasing accumulation of materials in the registers, which I cannot help thinking must be an evil, and a serious one.

I would also invite you to consider the important doctrine of prescription. Is the period not excessive? I refer not only to the long prescription, but also to the vicennial prescription of retours. I would observe, and the observation has relation, not to prescriptions only, but to the whole subject of titles to land, that all possession is in our times necessarily matter of much more notoriety than it was or could be when the rules respecting the effect of it originated. Any man in the possession of land must, in these days, so possess it as to invite a challenge of his right from any one in a condition to make it. The valuation roll is an excellent practical register, and one very much consulted. The facilities of communication, and of giving and obtaining information, which we possess and use, have changed the condition of things; and, for my own part, I think it is unreasonable and unnecessary for the protection of legitimate interests, to allow forty, or even twenty years, within which to bring forward a challenge to the title of a man who is in possession honestly and openly, and who has, no doubt, formed his habits, and made his arrangements in life in reliance upon its continuance. Such long delayed challenges are, no doubt, rare; but it is important, nevertheless, to establish a feeling of perfect security at an earlier period than the existing law allows. The question is also important as bearing on the marketable character of title, and the security of *bona fide* purchasers for a full price.

The great subject on which I have presumed to offer for your consideration these desultory remarks is, in my opinion, of an importance which it would be difficult to over-estimate, whether you regard it in the legal, or the social, economical, and political aspect of it. The first duty of those of us who are lawyers is to take care that any reform of which we approve shall not diminish, but, on the contrary, shall, if possible, increase the reasonable security of our land rights. I say the *reasonable* security—for you will, I am persuaded, agree with me when I say (not referring to our existing law, but speaking quite generally), that any system which, having regard to the vast majority of cases, is unnecessarily ponderous, complicated, and costly, is not to be approved only because cases may be supposed, or may even possibly occur, in which it would afford a certain security, which might otherwise be

wanting. We do not act so in other matters—even in those which may affect life itself. Life would be intolerable, almost impossible, if we were constantly on our guard against remote dangers of rare occurrence, and little apprehended by sensible men. Security, like other good things, may be loved unwisely, pursued too keenly, and purchased too dearly. But if, with reasonable safety to title, equalling or exceeding on the whole that which we have at present, we can devise a system of land rights according to which the property of land may be held and transmitted with the same certainty and facility as the property of money or goods, we shall effect a great legal and political reform. Let us trace such a system in the merest outline. If the relation of superior and vassal were abolished, and every existing *dominium utile* were made a *plenum dominium*, subject to the feu-duty and casualties as real burdens in favour of the existing superior and his heirs, it seems to me that the title would be simplified with safety and justice. An heir, on the death of his ancestor, would complete his title by simply establishing his character, and might possess on his ancestor's title assumed to be legally transmitted to him. A purchaser need only record the conveyance in his favour, and would have no superior to trouble him; although he might have payments to make under the real burden which I have suggested. There would be no more progresses of titles complicated and confused with superiorities and charters by progress, for these would cease to exist. Deeds of conveyance might be simplified and shortened, for the feudal relations and all their conveyancing confusions would be gone. A security for borrowed money might be created over land, or a house, by words as few and simple as would be used to express the fact in a letter, and might be transferred by a dated and signed indorsation bearing the names of the transferor and transferee; the claims of the revenue being satisfied by the use of an adhesive stamp.

I have next to invite your attention for a few moments to a subject of the highest importance. I mean the power which, consistently with sound policy, which I regard as synonymous with general convenience, ought to be accorded to proprietors to prescribe rules for the government of their estates with respect to succession and otherwise after death has made a separation between them and all earthly things. That a proprietor should have liberty to choose his heirs—to give his property to whomsoever he will upon his death, all, I presume, will agree. Further, as every one is personally best acquainted with the circumstances of his own family, relations, and friends, and

the needs and merits of the several individuals whom he may for any reasons desire to benefit, it will be generally conceded that he ought to have the power of reasonably settling his property in such manner as this knowledge of his, combined with an intelligent interest in those who have natural claims upon him, may suggest to his mind and affections. That a man shall have power to give his wife, or daughter, or friend, an estate for life only, and to postpone the *fiar's* right till that be terminated, seems reasonable, and equally so to allow him to secure and protect his children's provisions till they are of age to take possession and act as proprietors. But is it consistent with reason or policy to extend beyond this a man's power over his property after death? I do not enter at present upon the interesting subject of charitable foundations, but confine myself to entails. There is, and has for ages been, a remarkable concurrence of intelligent opinion against them, although they have held their ground among us so long. Craig speaks of them as odious in the estimation of our law—*"Nostro jure talliæ odiosæ reputantur."* Stair writes of them in various passages in strong language of reprobation. "Clauses *de non alienando* or *non contrahendo debitum* are most unfavourable and inconvenient, especially when absolute; for, first, commerce is thereby hindered, which is the common interest of mankind; secondly, the natural obligations of providing for wives and children are thereby hindered, which cannot lawfully be omitted; thirdly, it is unreasonable so to clog estates descending from predecessors, and not to leave our successors in the same freedom that our predecessors left us, whereby, though they have the shadow of an estate, yet they may become miserable." Again, "The perpetuities of estates, where they have been long accustomed, have sufficiently manifested their inconveniency, and therefore devices have been found out to render them ineffectual." And after referring to the devices which had been invented in England to defeat them—viz, *fine* and *recovery*—he adds:—"And if they become frequent with us, it is like we will find the same remedy." Erskine says:—"Entails of this rigorous kind, as they impose an unfavourable restraint on property, and become frequently a snare to trading people, are *strictissimi juris*." Bankton says:—"Strict entails tend to infer a perpetuity of the estate subject thereto, which, no doubt, is an inconveniency," and he submits it to the wisdom of Parliament whether some limitation might not be put to future settlements, that our strict entails may be reduced so as not to run into perpetuities. Professor Bell records his opinion in those forcible

words—"Of all restrictions on the commerce of land and on the rights of creditors to attach the property of their debtor, the most important and the most inexpedient and oppressive are those which arise from entails; and it is sincerely to be hoped that ere long some safe course may be devised for restraining the exorbitant effects of the entail law of Scotland, and for introducing some limitations consistent at once with the rules of justice and with public policy." You see what strong and vigorous expressions of disapprobation and condemnation our entail law has evoked from our greatest jurists and law-writers—Craig, Stair, Erskine, Bankton, and Bell.

In England, entails were introduced by the statute *De donis* which was passed in 1285, exactly 400 years before they were legalised in Scotland by the Act 1685. About 200 years elapsed before the application of common recoveries to remedy the mischief was devised; and it is remarkable enough that, in this country, we have hardly yet endured the evil so long as our English neighbours had 400 years ago, when they found relief in a fictitious proceeding (I quote from Blackstone) "introduced by a kind of *pia fraus* to elude the statute *De donis* which was found so intolerably mischievous, and which yet one branch of the Legislature would not consent to repeal." The evil effects of the law of entail which stimulated the ingenuity of the Courts to evade it are thus stated by Blackstone:—"The establishment of this family law (as it is properly styled by Pigott) occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail, for if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts, for, if a tenant in tail could have charged his estate with their payment, he might also have defeated his issue by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full, and treasons were encouraged, as estates-tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm. But as the nobility were always fond of the statute *De donis*, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the Legislature; and, therefore, by the connivance of an

active and politic prince, a method was devised to evade it." Down to 1833, entails in England could only be barred by the artificial and expensive device called a common recovery, to which I have alluded; but by a statute passed in that year the same effect was allowed to be attained by the execution and enrolment of a simple deed, and so the law stands now. Any heir of entail can absolutely at his own hand bar or defeat the entail so far as concerns his own issue—though, with respect to any ulterior estate created by family settlement, the consent of a person called "the protector of the settlement" is required. You are most of you, or all of you, aware of the reasonable limits within which family settlements are confined by the common law of England against perpetuities. An estate for life can only be given to a person in existence, and no restraint against alienation is effectual beyond the minority of the first taker on the determination of the estate for life.

It has always appeared to me that we have a most significant and instructive practical commentary upon the mischiefs of entails in the numerous and complicated statutory provisions made from time to time in order to afford relief from them. There is first the Montgomery Act (1770), to encourage the improvement of entailed estates under certain very intricate regulations. Then came the Aberdeen Act (1824), to enable heirs of entail to provide for their wives and children. Next, the Act of 6 and 7 Will. IV., cap. 42, (1836), passed to authorise tacks and excambions, and also sales to pay certain debts. This Act was extended in 1838, and in 1840 an Act was passed to enable entailed proprietors to grant sites for churches and schools, and ministers' and schoolmasters' houses. In 1841, the Act of 1838 was again amended, and in 1848 the great Act which bears the name of Rutherfurd was passed.

The time at my disposal will not enable me to say more of this Act than this, that I think the statute-books contain few, if any, more statesmanlike measures of law reform, and that, although even at the date of it, many, myself among the number, would have been glad had it been found possible to carry the relief further, it is very doubtful whether any larger attempt would have succeeded. What it does is, I need not say, done with consummate skill, and in such a manner as to smooth the road for the complete abolition of entails now, or whenever the country is prepared for so sensible and wholesome a measure, without anything of the shock to existing interests which might otherwise have been involved in a total repeal. What I most regret is, that the prohibition of future entails was not made a feature

of the Act. With respect to entails prior to the Act, the time is at hand when they may be expected to begin to fall in considerable numbers. An heir in possession, born on or after 1st August, 1848, being of full age, may disentail. There is, however, not only no restraint on new entails, but their execution is much more easy and certain, and each new entail must, or may, endure till the estate comes into the hands of an heir born after the date of it, and of full age. Twenty years have elapsed since this celebrated statute was passed. It has afforded no inconsiderable relief, I need hardly say at no inconsiderable expense, to entailed proprietors. Are the people of this country now prepared for the repeal of a law which, in the opinion of our greatest jurists, and I think of most sensible men, ought never to have been passed, and the total destruction of a system which has certainly worked much evil, as the very efforts which from time to time have been made to afford partial relief abundantly testify. If the time for further action has really come, it is our business as a Society to consider practically what that action safely may be, and ought to be, and to the consideration of that, as part of the business of the year on which we here enter, I respectfully invite you.

THE POOR LAW ACT OF 1845 (8 & 9 VICT., CAP. 83).

By DONALD CRAWFORD, Esq., ADVOCATE.

A GENERATION has elapsed since Parliament undertook to deal with the subject of poor laws in the three parts of the United Kingdom, and the condition of pauperism is again forcing itself upon public attention. The vast cost of the maintenance of the poor is itself a source of danger, and the number of paupers, whether it increases more rapidly than the population or not, at least shows no signs of diminution. Widely different opinions prevail on the true causes and the true remedies of the evil—opinions which are strongly held, and will be eagerly maintained.

The matter is worthy of, and will doubtless receive, the consideration of the Law Amendment Society; and as a preliminary to future discussions, I have prepared in the following paper a few remarks on the history and operation of the Act of 1845.

Laws relating to the poor find a place among the earliest of our statutes. The moving cause of legislation appears to have been here, as in England, the prevalence of vagrancy, the increase and depredations of sorners and strong and masterful beggars. Against these vagabonds stringent measures of repression, including even the penalty of death, were enacted from 1424 downwards. An exception

was always made in favour of the impotent and helpless poor, for whose relief the only contrivance at first devised, was that they should be licensed to beg by the authorities, a practice which partially continued down to 1845. The ancient poor law system attained substantially its complete form under the elaborate and instructive provisions of the statute 1579, cap. 74.

After enacting severe penalties against vagrants, this Act proceeds:

"And seeing charitie wald, that the poore, aged, and impotent persones suld be als necessariie provided, as the vagaboundes and strang beggars repressed, and that the aged, impotent, and poore people suld have ludging and abiding places throughout the realme, to settle themselves intill. It is therefore thocht expedient, statute, and ordained, that the Lorde Chancellor, according to the direction of sindrie lovabil Actes of Parliament heirtofoir maid, sall call for the erectiones of all hospitalles, to be produced befoir him, and inquire and consider the present estaite theirof, reducing them, so far as is possible, to the first institution, as may best serve, for the helpe and reliefe of the saidis aged, impotent, and pure people. And als that the Provosts and Baillies of ilk burgh and towne, and the Justice constitute be the King's commission, in every parochin to landwart, sall betwixt and the first said day of Januar nixt-to-cum, take inquisition of all aged pure, impotent and decayed persones, borne within that parochin, or quhilkes was dwelling, and had their maist commoun resorte in the said parochin the last seven yeires by-past, quhilkes of necessitie mon live bee almes: and upon the said inquisition sall make ane register buike, containing their names and surnames, to remain with the Provosts and Baillies within burgh, and with the Justice in everie parochin to landwart. . . . And thereupon, according to the number, to consider quhat their neideful sustentation will extende to everie oulk: and then, be the gude discretions of the saides Provosts, Baillies, and Judges in the parochinis to landwart, and sic as they sall call to them to that effect, to take and stent the hail inhabitants within the parochin, according to the estimation of their substance, without exception of persones, to sic ouklie charge and contribution as sall be thocht expedient and sufficient to susteine the saidis pure peopill, and the names of the inhabitants stented, togidder with their taxation, to be likewise registrate. . . . And gif the aged and impotent persones, not being sa diseased, lamed, or impotent, but that they may woork in sum manner of wark, sall be bee the overseers in ony burgh or parochin appoynted to wark, and zit refuses the same, then first the refuser to be scourged and put in the stokkes: and for the second fault to be punished as vagabounds, as said is. And gif any beggar's bairne, being above the age of five yeires, and within fourteene, male or female, sall be liked of be ony subject of the realme of honest estaite: The said person sall have the bairne, be ordour and direction of the said Provost and Baillies within the burgh, or Judge in everie parochin to landwart. Gif he be a man-child, to the age of XXIV. yeires, and gif sche be a woman-child, to the age of XVIII. yeires; and gif they depart, or be taken or intised from their maister or maistresse service, the maister or maistresse to have the like action and remedie as for their hired servand or prentises, as weil against the bairne as against the taker and intiser thereof. And quhair collecting of money may not be had, and that it is over great ane burding to the collectours to gadder victualles, meat and drink, or uther things for reliefe of the pure in sum parochines: That the Provost and Baillies in burrowes, and the saidis Judges in the parochins to landwart be advise of certaine of the maist honest parochiners, give licence under their handwrits to sik, and sa many of the saidis pure people or sik uthers of them as they sall think gude, to ask and gadder the charitable almes of the parochiners at their awin houses. Sa as alwayes it bee speedely appoynted and aggried how the poore of that parochin sall be sustained within the same, and not to be chargeable to uthers, nor troublesome to strangers."

Under this Act we thus find the parochial system developed, which has ever since been retained, and the principles of compulsory assessment introduced (apparently borrowed from the 14th of Queen Elizabeth), with the important omission, evidently not undesigned, of a provision for setting to work the able-bodied, though even the impotent poor are to be made to work to the extent of their ability. It is well known that this absolute exclusion of the able-bodied from the scope of the poor laws is a peculiarity which, down to the present day, has characterised the Scotch system in contradistinction to the English. By this statute the parishes were not obliged to raise the necessary funds by compulsory assessment; but as the relief of the impotent poor, either by that or some other method, was enjoined, a statutory right to relief was conferred upon the poor, which could be enforced by legal process. By subsequent proclamations of the Privy Council, the management of the poor funds, and the power of laying on an assessment, when necessary, upon means and substance—one-half on owners and one-half on occupiers—was committed to the magistrates of burghs, and in rural parishes to the heritors and kirk-sessions jointly. A pauper demanding relief was obliged to apply to these bodies. The Sheriff could aid him so far as to compel them to take his case into consideration. But if relief was refused, or inadequate relief offered, an appeal lay only to the Court of Session. In practice, the magistrates in towns, and the heritors in country parishes, left the ordinary administration of the poor funds, whether raised by assessment or not, to the kirk-sessions. Where there was no assessment, the voluntary contributions to the fund for the poor chiefly consisted of the collections at the doors of the parish churches.

Such was the state of the law previous to 1843, when a Commission was appointed to inquire into the operation of the Scotch Poor Laws. The subject of the poor laws throughout the United Kingdom had occupied the attention of the Legislature for some years before. The English Act was passed in 1834. The Irish Inquiry Commission had been issued in 1830, though the present Irish Act was not passed till 1847; and in 1839 the General Assembly of the Church of Scotland had made a report on the poor laws to the Government, based upon a pretty extensive and minute inquiry. The Commissioners were Lords Melville and Belhaven, Mr Home Drummond, Mr James Campbell of Craigie, Mr Edward Twisleton, the Rev. R. Macfarlane of Greenock, and the Rev. James Robertson of Ellon. Mr Smythe of Methven was secretary. The Commissioners took an enormous mass of evidence in every part of the country, which fills seven thick volumes.

The great evil which the Commissioners found, and which, in their opinion, rendered some change in the law necessary, was the inadequacy of the relief then afforded to the poor. "We are of opinion," they say, "that the funds raised for the relief of the poor, and the provisions made for them out of the funds raised for their relief, is, in many parishes of Scotland, insufficient." This observation was

applied both to assessed and unassessed, and both to burghal and landward parishes. "Throughout the Highland districts," the report proceeds, "and in some parts of the Lowlands also, where the funds consist solely of what may be raised by the church collections, the amount is often inconsiderable. In many of these places it will be seen that the quantum of relief given is not measured by the necessities of the pauper, but by the sum which the kirk-session may happen to have in hand for distribution."

"In the Highlands and Western Islands, when the poor have exhausted their small crop of potatoes, which, by the kindness of some neighbouring farmer, they have been permitted to raise, they are forced to cast themselves on the charity of their neighbours, many of whom are nearly as poor as themselves."

On the other hand, in the populous parish of the city of Edinburgh, where a compulsory assessment had been adopted, competent witnesses described the rate of allowance as "miserably deficient," and the managers of the poor had repeatedly urged the Town Council to raise the rate of assessment, but had always been denied.

The Commissioners, therefore, adopting the principle of the old law, that the impotent poor were entitled to relief, found that in many places they did not receive it; and that in many places the legal burden which the law imposed upon parishes was evaded by the richer classes, such as absentee heritors, and the support of the indigent left to the voluntary charity of neighbours not much richer than themselves. The appeal which the pauper had to the Court of Session was not a sufficient protection against these evils. There appeared also to be an excessive want of uniformity in the practical administration of the law, which had no necessary connection with the advantages of local government. The practices which still prevailed in some districts, such as providing for the poor by giving them licenses to beg, or by quartering them upon the inhabitants in rotation, appeared to be unsuited to the present age; and the widest divergence of opinion and practice was found in different quarters regarding the proper scale and method of relief to the impotent poor generally, and particularly to the sick and the insane, and those without a settlement when they applied for relief. The Commissioners, therefore, recommended that the State should have an organ in the shape of a Central Board, which should ascertain that the law was carried out in each parish, reporting annually to the Secretary of State, and which would tend to lead the whole country to a desirable uniformity of system; and that the heritors and kirk-session, or other managers of the poor in each parish, should appoint a paid officer to be in correspondence with, and responsible to, the Board of Supervision.

The institution of the Board of Supervision and of the inspector were the leading recommendations of the Commission. The introduction of a central supervision directly communicating with the Government was the only change suggested in the existing system which could be called a change in principle. The legal right to relief,

it has been said, was continued as before to the impotent poor, and as before limited to them. Compulsory assessment was not forced upon parishes which had not adopted it, and the management of the poor funds was left, in unassessed parishes, in the hands of the heritors and kirk-sessions. Other changes, no doubt, were proposed of considerable, though minor, importance. In assessed landward parishes it was recommended that the ratepayers should receive a share in the management, and form part of the constitution of a parochial board; in burghal parishes that the managers should be all elected by the ratepayers. Two other recommendations in reference to burghal parishes were not carried into effect, though there is now a general opinion that it would have been better if they had been adopted—namely, that all partly burghal and partly rural parishes should be treated as burghal, and all parishes within the bounds of a parliamentary burgh should be regarded as one for the purposes of providing for the poor and for settlement. On the ground that, in populous places, it appeared from the evidence that poor-houses, of which very few existed in Scotland, were necessary for harbouring the infirm and fatuous, and preventing the dissipated and idle from squandering out-door allowances, they recommended that power should be given to contiguous parishes to unite for the purpose of building a poor-house. The principal remaining proposal is that recommending the period for acquiring a settlement to be seven years.

The only dissentient from the report was Mr Twisleton, who had been an Assistant-Commissioner to the English, and at the head of the Irish Commission. He thought that the proposed alterations in the poor laws “were insufficient to remedy the defects which were admitted to exist in their administration.” In particular, he desired that unassessed parishes should be required to assess themselves; that the erection of poor-houses in towns with a population over 5,000 should be compulsory; and that in large towns workhouses, or wards in poor-houses, should be provided for the relief of able-bodied persons. The question of relief to the able-bodied is fully and ably discussed in the Commissioners’ report.

The recommendations of the Commissioners substantially passed into law. But before attempting to examine their results, it may be well to advert to a controversy which was much agitated in Scotland during the existence of the Commission, and for some years previous. The method of raising funds by compulsory assessment was not for a long time popular. It had been adopted, according to Dr Chalmers, in not more than eight parishes, or thereabouts, previous to the year 1740. That the power of imposing assessment should be conferred was a necessary consequence of giving a legal right to relief to the impotent poor. A legal right to voluntary charity alone would have been illusory. But with a comparatively small and equally distributed population, few absentee proprietors, and, above all, a single united church, still possessing, in every way, a powerful hold upon the people, it was found possible to raise funds which were considered

adequate without resorting to assessment. An immediate change, however, took place after the first secession from the church in 1733, and the example of England, where assessment was universal, gradually influenced the border and southern counties, where assessment became the rule long before it was adopted further north. Out of 885 parishes in 1820, the number assessed was 192. In 1839 it was 238, having increased more than twenty per cent. in nineteen years. The 238 parishes included all the large towns, and contained, speaking roughly, one-half of the entire population. During the same period the expense of maintaining the poor had greatly increased. The amount of the poor's fund had risen more than one-third, from £114,000 to £155,000, of which increase £27,000 was derived from assessment. The growth of assessment was looked upon with great jealousy and dislike by many persons interested in the administration of the Scotch Poor Laws. They pointed to the fact that in assessed parishes a staff of officials was required to administer the public funds, whereas in unassessed parishes there was no paid officer but the session-clerk. The General Assembly, in their report to the Secretary of State in 1839, from which the figures quoted above are taken, pointed out that, in the 238 assessed parishes, the cost of litigation and management was £7,342, and in all the others it amounted only to £666, and that the number of persons whose gratuitous services as elders of the church, were available for the administration of the poor funds, was more than 7000. The clergy were naturally opposed to the progress of a change which tended to remove the relief of the poor from the sphere of Christian charity. It was thought, too, that the tendency of an assessment was to diminish the minute care with which allowances from the poor's box were adjusted to the supplement of the wants of the indigent by those well acquainted with their circumstances. Among the enemies of assessment were Dr Chalmers and Lord Pitmilley. The former proved, in his parish of St John's, Glasgow, the possibility of successfully managing the poor without assessment, even in a populous city; and Lord Pitmilley in his work on the Poor Laws, published in 1834, has left a valuable record of the whole question as it stood at that time.

There are not a few persons at the present day who regard it as a great misfortune that the system of assessment has superseded the voluntary system. The latter had obvious and indisputable advantages, whether or not they outweigh the grave objection urged on the other side, that it suffered the rich to escape, if they pleased, from the common burden, leaving it entirely to the poor and benevolent, who did not, and could not evade it. It was cheaper; where heartily worked by the church officers, it was more thorough; and even though the pauper had a legal claim, and therefore there was the *ultima ratio* of assessment in the background, it was possible, where the voluntary system was still practicable, for the free play of sympathy between giver and receiver, for which Chalmers contended, to subsist; it was possible, in short, for the relief to the poor to be charity. It is

important to observe that the Act of 1845 was in no degree whatever the cause of the change. The dissatisfaction and alarm which the present aspect of pauperism in the country is in some respects too well calculated to excite, is sometimes vaguely expressed in the opinion that poor laws have a tendency to encourage pauperism, and break down the independence of the poor. That proposition is probably true, almost a truism. But it is to be feared that a confusion, fatal to the understanding of the whole question in Scotland, is sometimes made between poor laws in general, and the Poor Law Act under which we live; and it is certainly not true that that Act either introduced, for the first time, the legal right of the poor to relief, or caused the change by which assessment has been substituted for church door collections. That change was in gradual, spontaneous, and rapid progress, before 1845. It could have been arrested in one of two ways only: either by a resolution in favour of the old system on the part of the several parishes, arising from a persuasion of its superior advantages, or by the abolition of the legal right to relief. Lord Pitmilley was hopeful of the former course. He urged those interested in parishes to apply themselves to the duty of the management of the poor, and argued that with a stricter economy of the funds, which had in some instances been wasted on vagrants and others not legally entitled to relief, there would be enough in every parish without having recourse to assessment. The parishes had the power of abandoning assessment if they chose. In ten years, however, no progress had been made in that direction, and it is clear that the tide had finally set the other way. If there was any hope that the efforts of Chalmers and others would induce an effort to maintain the old system, it was dispelled when an event occurred in the Disruption of the Church, which made a recurrence to the voluntary plan virtually impossible. Dr Chalmers, on the other hand, desired to take away from the pauper any appeal from the kirk-session, and to do away with the power of assessment, which together constituted the pauper's charter to relief. I believe in some of his published writings he has expressed categorically his disapproval of a legal right, but the one thing is tantamount to the other. Chalmers would reluctantly have admitted a qualified exception in favour of supporting blind, deaf and dumb, and lunatic paupers, and those attacked by fever, from a public provision, as these cases could not multiply; and in times of great distress raising a public emigration fund by assessment.

No plan was, so far as I am aware, suggested by which the Legislature in 1845 could either avoid the evil inherent in poor laws, that they tend to break down the independent spirit of the poor, or check the practice of compulsory assessments except by abrogating all legal claim to relief on the part of the poor—in other words, abolishing the poor laws. The expediency of poor laws had no doubt been disputed by statesmen and economists of great eminence long before 1845; but in the then existing state of public opinion and all the circumstances of that time, it would hardly have been possible for the

Legislature to have discarded the principle of a legal provision for the poor. Scotland had had a poor law from the earliest times; and, notwithstanding the exception of Dr Chalmers, there was, I think, no considerable body of public opinion demanding its abolition or any change in its principle. A new statute had only recently been enacted for the largest part of the United Kingdom, after very full inquiry, and proceeding on a masterly report by Commissioners, by which relief was provided even to the able-bodied. An able-bodied poor law was also about to be passed for Ireland, and the system of poor rates was approved and had either been introduced or was in the course of introduction in almost every country in Europe. However, if the principle to be adopted by the Legislature was then a foregone conclusion, it does not follow that under altered circumstances, and after additional experience, the matter is not open for reconsideration at the present time, and this important question will be briefly adverted to in the sequel. I only desire to clear the ground by showing that it is futile now, as it was in 1840-45, for those who regret the disappearance of the voluntary system, or complain of the evils of compulsory assessment, to assume a conservative attitude, as if they wished to return to the old principles of the Scotch law, which they would insinuate have been violated by recent legislation. Their object can only be attained by a very radical change, introducing a complete novelty in Scotland.

The leading recommendations of the Commissioners have been already noticed. They were embodied, with few alterations, in the Act which followed, and it would be a waste of time to detail further the provisions of the statute, which is in our hands, and is, in its general features, familiar to us all. The Act has now been in operation for twenty-four years. There has therefore been time to judge how it has worked. Last spring, on the motion of Mr Edward Craufurd, a Committee of the House of Commons was appointed to inquire into the Poor Laws of Scotland. The Committee have already taken and reported a large body of evidence, and they have not concluded their labours. There can be no doubt that the time for such an inquiry has come. The result may be that the present system will be found perfectly satisfactory, or, as is more probable, the new machinery of the Act may be found capable at least of some amendment. But apart from other disputed points, there are admitted facts which made inquiry desirable. 1. The large amount of pauperism, whether increasing or not. In 1868 the total number of registered poor was 104,541, their dependents 69,205. On 14th May, 1868, the total number relieved

was—Registered,	-	-	-	80,032
Dependents,	-	-	-	48,944

Total,	-	-	-	128,976
Add casuals and their dependents,	-	-	-	7,260

Total,	-	-	-	136,246, being 4.278 per cent. of population.
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2. The enormous and progressively increasing expense of the system. The total sums expended on the poor, exclusive of buildings and sanitary measures, was—In 1846, - - £295,232

In 1868, - - 795,483

3. The alarming increase of pauperism in some parts of England, especially in the metropolitan parishes, naturally leads us to look whether our own system is sound. These facts inevitably cause a feeling of uneasiness and dissatisfaction in the public mind, which finds expression in attacks on the existing system—attacks often, though not always, proceeding from enlightened and benevolent men, who are practically conversant with a whole or part of the subject, and whose experience and opinions are of the greatest value, but at the same time not seldom apparently based on misleading calculations, and prescribing contradictory remedies. In short, the opinion is for every reason well founded, that light and investigation are required.

The leading heads of the present system, or topics arising out of its discussion, every one of which has been the subject of attack or controversy, are—The Constitution of the Parochial Boards, the Board of Supervision, Poor-Houses and Outdoor and Indoor Relief, Principle of Rating, Area of Chargeability, Settlement, Relief to the Able-bodied, the Proportion of Irish Paupers, Vagrancy. Twenty-five witnesses have been examined by the Committee. I shall attempt to comment upon the general result of their evidence upon some of these topics. There will be space only for the first three.

1. The constitution of the Parochial Boards* appears to have worked well on the whole, but some changes are suggested, regarding which there is a fair amount of agreement. In landward parishes the kirk-session, to the number of six, are *ex officio* members of the Board. There are besides all heritors over £20, and a certain number (fixed by the Board of Supervision) are elected by the ratepayers. While no complaints are made against individual ministers or elders, a feeling of dissatisfaction is widely prevalent that they should have an *ex officio* position at the Board, and at least a larger share in the representation is demanded for the ratepayers. In these days, some alterations in the directions indicated cannot well be resisted. Parishes partly burghal, partly landward, such as St Cuthbert's, are treated as landward, with the addition of the provost and bailies as *ex officio* members of the Board. The result is a most unwieldy body entitled to sit at the Board, and a great abuse of general mandates, which are held for years and used to overturn the decision of majorities at large meetings. It is almost universally thought that such parishes should be treated as burghal, and the use of mandates in all parishes placed under stringent limitations. In burghal parishes the rule is, election by the ratepayers, with a plurality of votes, according to value, up to six. This constitution appears to give satisfaction. The number

* See sections 16 to 29 of the Act.

thus elected does not exceed thirty. There are, however, eight *ex officio* members from the town councils and kirk-sessions—a feature which is objected to by some intelligent witnesses.

2. The introduction of the Board of Supervision was the only novelty of the Act of 1845. The utter want of uniformity under the old system was the cause of some of its greatest evils, such as the inadequacy of relief and the prevalence of mendicancy. Lord Pitmilley, though a strenuous advocate of the voluntary system, considered that some central supervision was essential, and (writing nine years before the Disruption) he recommended that the local managers should be superintended by the General Assembly, which had always taken a beneficent interest in the administration of the poor laws. The Board consists of a chairman, the Lord Provosts of Edinburgh and Glasgow, the Solicitor-General, and the Sheriffs of Perth, Renfrew, and Ross, and two unpaid members appointed by the Crown. A secretary is attached to the Board, and there is a small staff of clerks, and three or four travelling inspectors.* The chairman and secretary attend daily, and the Board meets weekly. The Sheriffs have always been regular in their attendance, and take an active share in the business, and they and the chairman and secretary constitute the ordinary working power of the Board. The name of the Board correctly indicates that its relation to the Parochial Board is one of supervision rather than of control. The local inspectors report twice a-year to the Board, and the Board send down their own inspectors to examine the books, poor-houses, etc. An applicant who is refused relief has an appeal, not to the Board of Supervision, but to the Sheriff. On the other hand, the Sheriff cannot prescribe the amount of relief. If the pauper complains that his relief is inadequate, he appeals by schedule, which the inspector is obliged to fill up and transmit to the Board of Supervision. The Board cannot overrule the decision of the local managers. They can only remit the case for reconsideration to the parochial board, and if the parochial board refuse to adopt their views, they can issue a minute certifying that the pauper has a just cause of action. As might be expected, the parochial boards hardly ever push the matter to this extremity. The number of appeals is not excessively large; and the cause of complaint is removed, that is to say, the local Board is induced to give way, in about one-fourth of the cases. The Board of Supervision further prescribes the scales of poor-house diet; sanctions the erection of poor-houses; and certifies that those erected are sufficient for their purpose. The Board also mediates between contending parishes, and, in short, acts as a central organ for the whole system. Subject to these indirect restrictions, the local Boards exercise complete

* The salary of the chairman is £1,200, that of the secretary about £800, the Sheriffs receive each £150. The sum was recently raised from £100, when additional duties were thrown on the Board, under the Public Health Act. The total cost of the establishment, including a large item for the expenses of the travelling inspectors, is stated to be between £8,000 and £7,000.

freedom of action, and the result is, that the expenditure in its different items, including the amount of allowances to paupers, varies considerably according to the circumstances of different parishes, and the views and the efficiency of the local management. The average amount of allowances to paupers has largely increased over the country, and it would be an important fact if that could be traced to the exercise of the pressure which the Central Board is able to put on the local bodies, with a view of making the allowances adequate. Such a result of the action of the Board might, on investigation, have been condemned, or it might have been justified, on the ground that the Board had only taken care that the law was not defeated by the parsimony of the ratepayers. But the evidence which has been published does not disclose a feeling on the part of the parish Boards that they have been led into extravagance by the Board of Supervision. The increase in allowances appears to have been spontaneous, at least in those parishes in regard to which evidence upon that point has been furnished.

There is considerable difference of opinion on the question whether the jurisdiction of the Board ought to be extended or revised. The present appeal to the Sheriff in cases of refusal of relief, which is defended by some witnesses on the ground that a resident magistrate is the only possible appellate authority who can inquire into the facts, is very much complained of by others, both parish authorities and Sheriffs, who testify that proper inquiry cannot be given by the Sheriff, and that the cases are either always refused or always admitted (generally the latter) according to the notions of the individual Sheriff. Practically, the present appeal does not appear to work uniformly or well. A change would probably be attended with no disadvantage. If an appeal to the ordinary courts of law can be taken away without oppression, it is a clear gain. The legal aspect of pauperism ought not to be made more prominent than is necessary. The common feelings of humanity towards a starving man might be trusted so far as to transfer the pauper's appeal for interim relief to a committee of the parochial board, with an ultimate reference to the Board of Supervision, on the same plan as in cases of inadequate relief. The sums spent on litigation have been a real scandal in the administration of the poor law. The amount is decreasing in consequence of many questions having been settled. Considering that the whole system may be looked upon as the administration of a single public department, that much of the money spent on litigation has been grievously wasted, and that even public bodies are not exempt from the temptation of embarking in litigation hastily and out of pique at the expense of their constituents, perhaps there would be no sufficient objection to a change which should make the right of action of parochial boards against each other subject to the veto of the Board of Supervision, even if it were thought that such a change made it necessary to strengthen the legal element in the Board. It would conciliate public confidence if all or nearly all the members of the Board were made working members. The addition of a paid medical officer has been

suggested. The presence of such a member might be valuable, but it is right to say that there appears to be no complaint of the administration in sanitary matters. It is difficult to see that anything would be gained by adopting the proposal that the meetings of the Board should be open to the public. A few voices have been raised in favour of the abolition of the Central Board. But some degree of uniformity of system—some plan of superintendence over the local Boards—some contrivance for an appellate jurisdiction without expense in pauper claims—some central responsibility for the immense sums expended by the nation on poor and poor-houses—are objects which nearly all would admit must be secured, and no way has been suggested in which these objects could be secured so cheaply and effectually as by such a Board as now exists.

It is a separate question, whether the actual Board which has been in operation since 1845 has done its duty well? On that point the testimony is emphatic. It has worked diligently, impartially, and judiciously, and it has gained the confidence of the parochial boards. When the present inquiry was demanded, it was announced that specific charges would be brought against the Board, of oppression and injudicious action towards the parochial boards. But these have completely, and indeed shamefully, broken down.

At the same time it may fairly be asked how the Board can account for the enormous increase of expenditure for which it is primarily responsible? On that point it may be hoped that more detailed statistics and explanations will be forthcoming before the Parliamentary Inquiry is closed. In the meantime, the Board would probably answer—1. The cost, great as it is, is of comparatively little importance, if we can show that we have kept down the amount of pauperism. This they are able to do to a considerable extent.* The proportion of poor to the population has remained stationary since the Act came into operation, and the report of the Commissioners of 1843 shows that no fair comparison can be made with the period before the Act, when the poor in whole counties received hardly any public relief, and those licensed to beg did not enter the roll. 2. There is a great

* The figures are—

	Total Registered.	Per cent. of Population.	With Casuals.
On 14th May, 1847, - - -	108,010	3·811	—
Average of 10 years before 1859, -	113,290	3·842	4·008
Average of 9 years to 1868, -	120,265	3·861	4·086

This does not include casuals. Their number has diminished from 7,675 in 1850 to 7,260 in 1868. The increase is on the dependents of the registered poor.

As an example of a populous city parish, the figures for the City Parish of Edinburgh are:—

Year.	Population.	Registered Poor.	Casuals.
1846, - - -	56,330	2,090	1,370
1853, - - -	66,734	2,981	2,426
1862, - - -	66,429	2,864	1,448
1868, - - -	—	2,249	3,194

In large towns, even where the number of registered poor does not increase, the number of applications appears to be generally on the increase—e.g., in the Barony Parish and Dundee.

increase in the expenditure on lunatics, who must now be boarded in asylums (except where an asylum is licensed in the poor-house, or exceptions are allowed by the Lunacy Board), at from £25 to £30 a-year, and on medical relief and poor-houses, and the necessary staff of poor-houses, which, it may be assumed, is well spent, and good economy in the long run. 3. Wages are said to have risen by one-half, a labourer who used to receive 10s expecting now 15s, and along with wages the price of provisions. This has involved a proportionate increase both of salaries and allowances. 4. It may be said the expenditure might have been reduced in some places by the local Board—for example, by applying more stringently the poor-house test. But the Board of Supervision could not interfere further in that direction than it has done.

Such are generally the causes to which the increased outlay has been attributed. It would be desirable, however, that the operation of each should be traced in more detail than has been done. The expenditure is 5s 5d per head of population; in England it is 6s. It is a fair question whether the Board of Supervision could have done anything to stem the increasing expense. But at present there is no evidence to show how they could.

The Board has confined itself to working out the Act, without initiating or advocating any particular line of policy, except, in one particular, which leads to a second point—the erection of poor-houses.

3. Previous to 1843, there were only about half-a-dozen poor-houses in Scotland, and the Commissioners, upon the evidence before them, recommended their erection in all populous places, both as a refuge for the infirm, and a check upon the dissolute. Their erection was not made compulsory; but the Board of Supervision has constantly encouraged them, and the result is, that there are now more than 60 poor-houses, available to, and able to accommodate the poor of parishes containing two-thirds of the entire population. The increase of poor-houses is regretted by many benevolent and intelligent observers. The objections urged against them are—1. The expense. In some districts they have been erected at great cost, in the hopes of diminishing the rates, and that hope has not been realised; 2. The fact that they are in some places only occupied to the extent of a very small portion of the accommodation, while the staff has to be kept up; 3. That it is a hardship to compel the most helpless and deserving poor to herd with the vilest characters, or even to subject the former, who have a legal title to relief, to the prison-like discipline and restrictions of a poor-house; 4. That pauperism in a poor-house creates a moral atmosphere poisonous to the young, and utterly demoralising to all; 5. That the poor are made more comfortable in the poor-house than the struggling labourer is at home; 6. That the poor-house encourages vagrancy; 7. That the average expense of a pauper in the poor-house is greater than his allowance out of doors; 8. That the inmates are idle.

A great preponderance of evidence, however, seems to show that the principle of indoor relief is sound, and, indeed, essential to the

administration of a poor law in a large and populous community. On the other hand, the evils complained of are real, and ought to be avoided under a well-administered system. Indoor relief proceeds on the principle that the condition of the pauper ought to be made less desirable than that of the independent labourer, otherwise the spring of industry will be relaxed. In the eye of the State that principle is applicable even to the most deserving pauper, though it is neither the rule nor the practice to force such paupers into the poor-house against their will, unless they are clearly unable to take care of themselves outside. No pauper, therefore, can complain of poor fare and some restriction of liberty. Practical experience has clearly proved that, especially in large towns, the poor-house, as a test of poverty, is both efficient and indispensable. The inspectors are besieged by hundreds of blackguards, who have reduced themselves to such a state of misery that it might not be possible to refuse relief. The shelter of the poor-house is offered, and in these cases it is generally declined. But the parish is saved the necessity of giving an allowance, which would certainly be abused. Poverty, like illness, requires a test; and if the principle is sound, there is no hardship whatever in the test of indoor relief. It is in large towns that the poor-house is most essential. There the inspectors are unanimous in saying that the law could not be worked without it, and it is a strong argument in favour of an even more stringent application of the test that a large quantity of the outdoor relief now given in large towns is undoubtedly spent on strong drink. The public-houses in the neighbourhood find a considerable accession to their receipts on the weekly pay-day of the paupers, and witnesses speak to their defiling in large numbers straight from the inspector's office to the spirit shop. But for the poor-houses, the amount of pauperism could certainly not have been kept down to the extent that it has been. It is in country districts that the complaint is made that poor-houses stand empty, and in individual cases there is more room for difference of opinion regarding the necessity for their erection. In a thoroughly well managed country parish, it is probable that the cost of a poor-house might usually be saved. Under certain circumstances, however, its effects are strikingly salutary. In the Lorn Combination, containing several Highland parishes, on the erection of a poor-house, the number of paupers was diminished by more than 50 per cent., and not only so, but almost every one of those struck off the roll were traced and found to have become industrious and self-supporting. This deterrent effect of the poor-house is legitimate, and is the answer to all objections on the score of expense. It is worthy of consideration whether even greater economy than at present could not be introduced into the dietary of poor-houses. We learn from the governors that the paupers are epicures, and grumble extremely if the food is not to their mind. It is probably to be regretted that the Board of Supervision did not anticipate public opinion by insisting on a more perfect classification of paupers than is provided by their rules. There is a classification according to sex and age, but no other.

Classification may be a difficult task, but if the present objections which exist to the poor-houses, and which are to a considerable extent well founded, are to be removed, it must be undertaken. Accommodation, either in separate wards or separate buildings, ought to be provided for the different classes of poor. Hardly any one objects to an almshouse, or to a house of correction. But, by combining the two, it is said you have a hell, into which it is barbarity to ask the poor man to enter. It is worthy of remark that our old statutes recognised the principle of classification. They enjoined the repairing of hospitals and almshouses for the impotent poor, and the erection of houses of correction for vagrants and strong beggars. We may, perhaps, find it expedient to return systematically to their principles on these points and others in dealing with the poor; for example, their policy was enlightened in providing for pauper children. The system of boarding out children is rapidly extending in Scotland. It has hitherto been completely successful. No difficulty is found in getting cottagers in the country, or operatives in villages, to take the children. They appear invariably to become in all respects part of the family, and they become absorbed in the industrious population. At present, however, the general, if not universal rule is, that no child is separated from its parents without their consent, and many children are brought up in the poor-house where they are educated, or from which they go to school. These children look on the poor-house as their only home, and almost always remain paupers. The rule ought to be absolute that no child is to live in any description of poor-house. It is false humanity to hesitate to remove a child for his good from a pauper parent. Indeed, it is not to be regretted that the deprivation of children should be dreaded as one of the possible consequences of pauperism.

If the poor-houses were cleared of children, and the respectable separated from the bad, a great evil would still remain in the unnatural condition of listless and hopeless idleness in which the inmates pass their lives. The Scotch law offers relief to the impotent only, and not to the able-bodied. But the Act of 1579 enjoined that the impotent poor should be compelled to do such work as they were able for. This principle has not been altogether lost sight of in the administration of some poor-houses, but it has not generally been carried out with much effect. Moreover, it seems to be certain that, notwithstanding the difference in the law, the inmates of a Scotch poor-house are not materially a different class from the inmates of our English work-house, except when the latter is crowded in a time of exceptional distress, by the industrious classes. The example of England is perhaps not calculated to excite very sanguine hopes from the introduction of work. But perhaps the experiment has not been tried there in the best manner. The work must be useful, not a mockery, like lifting weights or digging holes; and it ought, perhaps, to be rewarded at a low rate by the piece. The economical objection of bringing pauper labour into competition with independent labour is a serious difficulty, which must be taken into account in any scheme for setting paupers to work. The

competition of the impotent paupers of Scotland would, however, not be formidable, and if it were, the objection is not conclusive if a greater amount of evil could be remedied. There would also be great difficulty in finding proper employment for all. But the object, if attainable, is of the utmost importance. The poor-house is liable to abuse at present by certain classes of paupers, *e.g.*, by mothers of illegitimate children, who use it repeatedly as a lying-in hospital, leaving it when they recover, and returning as occasion requires. In such cases confinement for a certain period, say a year, or till the expenses incurred had been paid by work, should probably be exacted, and the child looked after, but in such a way as not to relieve the pocket of the parent. Extraordinary stories are also told of paupers leaving the poor-house more than a dozen times and returning as often in one year, having sold, on each occasion, a suit of clothes belonging to the parish, and got drunk with the proceeds. It is difficult to believe that such cases could not be dealt with at present. But some restriction is nevertheless required upon the liberty of going and returning.

While maintaining that poor-houses—or, it may be, almshouses and workhouses—are an essential part of the machinery of a poor law, I would not be understood to consider the administration of relief in a poor-house by the officials appointed under the law so salutary as the aid given by the hand of charity seeking out the poor in their own dwellings. Would it then be possible at present to abolish the poor law, and leave the poor to be dealt with by charity? It may, perhaps, be thought that discussion on this point is superfluous. But the total abolition of the law has been advocated before, and will be again. Many persons, it is said, are inclining to that view in England; and the burden of pauperism is so heavy in the United Kingdom, that the public will not rest till the matter is sifted to the bottom in all its aspects. It is obvious that the enactment or non-enactment of a poor law, the conferring or not conferring a legal claim to relief upon the poor, is a matter of pure political expediency. That the fact of a man's being born in the country entitles him to a maintenance from the State, is, it may safely be affirmed, an entirely false proposition. On the other hand, public feeling will not allow men to starve. Therefore, if there is no certainty that the starving are relieved, mendicancy will flourish. It would be unjust and impracticable to punish mendicancy if the beggars are starving; and it was just to enable the authorities to suppress begging that the poor laws were first enacted. The same dilemma exists now; and therefore the first justification of poor laws is that they are a protection against mendicancy, which in these days would grow, if unchecked, to be a most dangerous evil. Secondly, though the pauper has no inherent right to call upon the State for relief, the State is entitled and bound to protect the poor and the benevolent from an undue share in a common burden, which does, in point of fact, fall on the community. The burden is very heavy; and it is certain that many of the rich would not pay their fair share except

under compulsion. 3. A minor consideration is—the authorities who deal with paupers are necessarily vested with certain powers of restraint and compulsion, which, perhaps, ought to be greater than at present, and which could not so conveniently be placed in private hands. 4. While the arguments urged by Chalmers and others, for the superiority of organised voluntary charity to legal relief, are unanswerable, if the law retired to-morrow, is charity ready with her organisation to step in? surely the answer must be no. Chalmers said the object could be effected only by bringing men more closely under the influence of the pulpit. In other words, he correctly characterised the task as one extremely difficult of achievement, and only possible under a strong moral influence and impulse. With such a power, great results may, no doubt, be obtained. But no more than the germs of such a power yet exist in the country, and the organisation of voluntary bodies is a thing of very slow growth. For all these reasons, the conclusion seems inevitable that the day is still distant when the idea of the State abdicating the administration of the poor law, can be safely entertained. The question then arises, whether the present state of matters is satisfactory. In regard to the three topics which have been touched upon, I have ventured to approve generally, though not without qualification, of the present system; and I know of nothing in the topics which have been necessarily omitted which would involve any material shortcoming in the present law. It is also a considerable result to have kept down the ratio of pauperism to the population to the same level for the last 20 years. The figures in Scotland are more satisfactory than in England. (The proportion of paupers to the population is, however, in Ireland, according to the published statistics, much lower than in the other two kingdoms). Still the prodigious amount of pauperism in a time of peace, the increasing number of paupers, though the ratio at present does not increase, and the expense, entirely preclude satisfaction with the present state of matters. Some of the causes of this alarming mass of pauperism are perhaps patent. But the remedies are not so. One cause is drunkenness. If the sums expended by the poor on excessive drinking were devoted to making a provision for misfortune and age, an immense amount of pauperism would disappear. Another cause is the vicissitudes of trade, which attracts people to large commercial centres and encourages the increase of population, and then at some turn of the tide leaves them destitute of employment. Another cause is the want of prudence on the part even of respectable men. The very highest class of workmen do make some provision for the future; but a large number—*e.g.*, in Edinburgh, who know for certain that their employment can only last for part of the year, make no effort to provide for the time of idleness, far less look so far a-head as old age. Another cause is the depopulation of the country and the overcrowding of cities. The country is the nursery of the nation. The physique of men undoubtedly degenerates in a generation or two in cities among the poor, who have bad dwellings and no change of air. The country, there is at least much evidence to show,

could support, and indeed requires more resident labour than it now has; and the restoration there of the system of cottages and family life, instead of bothies and gangs, would be a great improvement. The sources of pauperism lying so deep, it is only, as has often been said, by education and by a more enlightened and sustained spirit of benevolence in the community that they can ever be dried up; not by a law. Experience has shown that pauperism can be controlled, but cannot be cured by legislation. It has shown that a legislative provision for the destitute is still necessary in this country. The machinery of the law may be capable of indefinite improvement; but the law is not in fault if it has been found impossible by its machinery to perform all the offices of charity, and to heal the most subtle and inveterate mischief of crowded civilisation.

ON THE EXCLUSIVE RIGHT OF SOME SUPERIORS' AGENTS TO PREPARE CONVEYANCES OF THE FEUS.

By WILLIAM ROBSON, Esq., S.S.C.

ONE of the most important questions likely to arise in connection with any future reform of the laws affecting land rights in Scotland, is that of the respective rights of superiors and vassals; and it is one which will require careful consideration, with a view to the removal of obstacles to the free transmission of land, without impairing the value of the estate reserved by the superior, or diminishing his security for the payment of the feu-duties, and the observance of the conditions on which the feu was granted. I do not intend in this paper to enter into that question; but I propose to direct the attention of this Society to a particular condition which is inserted in some feu rights, and which, I think, may very well be considered apart from the general question, and be dealt with by itself. The condition to which I refer is one to the effect that all conveyances of the feu, or of any part of it, must be prepared by the law agent of the superior under pain of nullity. I presume it is not necessary for me to spend much time in pointing out the injustice of such a stipulation. When a feu is granted, it becomes a separate estate in the person of the vassal, who has the power to sell or dispose of it at pleasure—subject, of course, to the superior's rights. In the case of a sale of the feu the superior has no interest in the bargain between the seller and purchaser; but this condition, which I have mentioned, precludes the only parties interested in the transaction from employing their own agents to prepare the deed of conveyance, and compels them to employ a particular one, in whose appointment they have no voice. It is a condition which establishes a monopoly of an obnoxious kind, and to which all the objections to monopolies apply. It is unfair to the general body of law agents, as it lessens their legitimate remuneration; and it causes unnecessary expense to purchasers of property.

The way in which it works is this. A purchaser of a feu held under this condition, on being made aware of it, may, for the purpose of avoiding expense, employ the superior's own agent directly to prepare the conveyance; and in this case the wrong done to the purchaser's agent, in not employing him in the business in which, but for this condition, he would have been employed, is manifest. In the general case, however, the purchaser employs his own agent. When this is done, the purchaser's agent instructs the superior's agent to prepare the deed, and the superior's agent may demand the usual *ad valorem* fee for doing so. But it is necessary for the purchaser's agent to revise the deed after it is drafted by the superior's agent; and for this he must, of course, be paid. This expense is, therefore, additional to that which is usually incurred in the purchase of property, and it would not be incurred but for this condition being enforced. Sometimes, however, the superior's agent does not charge the *ad valorem* fee, but charges regulation fees—i.e., fees according to the length of the deed, which are generally less than the *ad valorem* fee; and in this case he charges for correspondence and meetings also. In this case the purchaser's agent will probably charge his client merely the *ad valorem* fee, and will pay the account of the superior's agent out of it, retaining only the balance as his recompense for the revisal of the deed, which he was quite competent and willing to prepare, and for the trouble of examining the progress of titles, and the responsibility attaching to him in regard to their sufficiency. The sum thus coming into the pocket of the purchaser's agent is often very inadequate remuneration for all this; but, taking even the most favourable instance, it must be less than he is entitled to. This will appear if we consider that the *ad valorem* fee covers four things—viz., 1st, the examination of the progress of titles; 2d, the drafting of the conveyance; 3d, the correspondence and meetings in regard to it with the seller's agent; and 4th, the responsibility undertaken by the purchaser's agent, that the title is sufficient. When the superior's agent prepares the deed, we may take the regulation fees, as they are called, which are paid to him out of the *ad valorem* fee, as representing that part of the latter which is strictly remunerative for drafting the deed, leaving the remainder of it to cover, 1st, the examination of the titles; 2d, the correspondence and meetings with the seller's agent; and 3d, the responsibility in regard to the sufficiency of the title. But in addition to these, the purchaser's agent has, 1st, the trouble of revising the draft; and 2d, correspondence with the superior's agent; and therefore either he must do that work gratuitously, which is unfair to the agent, or the purchaser must pay for it, and thus be saddled with unnecessary expense. I would only remark further here, that this is a condition which does not benefit the superior in any way. The only person who is benefited is his agent, who gets the fees of drafting a number of deeds which the parties interested in them did not wish him to prepare, and which could have been prepared as well by any other agent.

The only reason which I am aware has been given for maintaining such a condition is that it secures that conveyances shall not be granted in contravention of the superior's rights. On this I would make only two remarks—viz., first, that the law gives the superior ample means of vindicating his rights independently of any such vexatious machinery as this; and, second, that this reason casts a most undeserved slur on the general body of law agents.

The validity of a condition of this kind, when depending merely on the stipulations in a contract of feu, came up for discussion in the case of *Campbell v. Dunn and others*, reported in the Faculty Collection, under date 28th May, 1823, and in the House of Lords, 29th June, 1825, 1 W. & S., 690; and again in the Court of Session, 4th March, 1828, 6 S. & D., 679. The Court of Session at first sustained the validity of the stipulation. The case was appealed to the House of Lords, and, after a full argument, was remitted by their Lordships to the Court of Session for the opinions of the whole Judges. The case was then heard before the whole Judges, and six of them—viz., Lord Justice-Clerk Boyle, and Lords Pitmilley, Meadowbank, Medwyn, Glenlee, and Newton—were in favour of the validity of the condition, while four—viz., Lords Alloway, Cringletie, Mackenzie, and Eldin—were against it. The Judges of the First Division did not deliver any opinions, as the pursuer abandoned the case. His reasons for doing so are not stated in the report, and it does not appear whether it was on account of his having become satisfied that it was not for his interest to insist on the condition, or on account of an objection which, at that late stage of the case, was taken to his title to sue. Be this as it may, I am not aware that since that time any attempt has been made to enforce such a condition when depending merely on contract.

But there are cases in which a condition of this kind depends not on contract merely, but on legislative enactment. In the case of entailed lands situated near increasing towns, Acts of Parliament have from time to time been got authorising the feuing of these lands on certain conditions. In one of these Acts, at any rate, and it may be in more, a condition of this kind is inserted. I quote the following from the Grange Feuing Act, passed in 1825, and under the authority of which nearly the whole of the estate of Grange, situated on the south side of Edinburgh, is feued. After specifying the conditions on which the feus might be granted, the Act proceeds to declare that the original feu charters shall contain a clause "providing that for the more effectual observance of the foresaid conditions, declarations, and provisions, the dispositions or other conveyances of the whole or of parts and portions of the said lands or feus, with the infestments to follow thereon, or on the original feu contracts and charters, or charters of progress, and on precepts of sasine of the same, shall be made out, taken and extended by the agent of the heir of entail for the time being at the proper charges and expenses of the vassal or disponers of the said lands, or of the said disponees or other person or persons

in the right of the said feu or feus for the time, otherwise the same shall be void and null; declaring, also, that all sales, dispositions, or conveyances, and transmissions, legal or voluntary, of the whole or any parts or portions of the said lands, upon terms in violation of or inconsistent with these conditions, declarations, and provisions, shall be *ipso facto* void and null to the disponees thereof, with all that shall follow or may follow thereon, reserving, however, power to the said vassal or vassals or other person or persons in the right of the said feu or feus, to grant infeftments of annual rent, and dispositions, and infeftments in security upon the premises, and to infeft their wives and husbands in the life-rent thereof, to be held of themselves, without the necessity of being confirmed by the heir of entail in possession as aforesaid or his foressaids; all which clauses, and the conditions, declarations, and provisions thereof, with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow upon such feu charter or feu charters, or feu contract or feu contracts, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feu or feus, otherwise such feu charter or feu charters, feu contract or feu contracts, and such sasines, conveyances, transmissions, charters, and investitures of any such feu or feus, shall not only be void and null, but the said *Sir Thomas Dick Lauder* and every other heir of entail in possession of the said entailed lands and estates, omitting to insert the same in the original feu charter or feu charters, feu contract or feu contracts, or omitting to repeat the same in the subsequent charters or other investitures granted by him or them of such feu or feus, shall thereupon, for himself or herself only, incur an irritancy, as in a case of contravention of the said entail, and in the like manner the said vassal or vassals or other person or persons in the right of the said feu or feus, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses in any instrument or instruments of sasine to be taken of the said feu or feus, or in any of the transmissions or conveyances thereof, such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals, or other person or persons in right of the said feu or feus, shall forfeit and lose all right and title thereto, and the same shall belong to the said *Sir Thomas Dick Lauder*, or the heir of entail in possession as said is, in the same manner as if such feu or feus had never been granted."

It will be seen from this clause that not only is a conveyance of a feu on this particular estate prepared by another than the agent of the superior null and void, but the vassal employing another agent to prepare it forfeits his feu. As these conditions are imposed by Act of Parliament, the only way of getting rid of them appears to be by the interference of the Legislature. And it appears to me that this is, as I have already said, a grievance which may be dealt with apart from the general question of the relations of superior and vassal, and that an effort for its removal may very fittingly be made by this Society.

I have accordingly prepared a Bill for this purpose, which I now lay on the table. It provides that every such condition in any deed or Act of Parliament shall be held to be sufficiently complied with if the conveyance is prepared by any duly qualified law agent. And as in the section of the private Act of Parliament, which I have quoted, there is a provision that the superior shall incur an irritancy if any other than his own agent prepares a conveyance of a feu, I have inserted a provision to prevent that result. If it seems right to this meeting, I would suggest that this draft Bill be referred to the Bills' Committee for consideration, and on their report the matter may again be brought up, and such action taken in the matter as the Society may think right.

ON THE CONFLICT OF LAWS ADMINISTERED BY THE SUPERIOR COURTS IN GREAT BRITAIN.

NO. IV.—CIVIL JURISDICTION—*Resumed.*

I RESUME the position that the Superior Courts in England and Scotland, though not the Courts of independent states, bear to each other a relation *analogous* to that of the Courts of separate independent states.

It will be obvious, from the discussions in the foregoing papers, that this analogy is very close. I shall therefore conduct this inquiry, in the first instance, on the hypothesis that the Courts are those of independent states. I shall afterwards consider how the results must be modified in consequence of the relations, already touched upon, which the Courts of the two countries bear to the common Sovereign.

I consider first the rules upon which the Courts in each country claim jurisdiction; for the jurisdiction of each is generally, as in the Supreme Court of an independent state, *that which it assumes in accordance with its own rules.*

It scarcely ever happens that a Court will initiate a cause *proprio motu*. The aid of the Court is claimed by a person (pursuer, complainer, prosecutor, petitioner, or plaintiff), who may be designated by the generic name of *pursuer* or *plaintiff*; and it is of the essence of every proceeding in a court of justice that the *pursuer* or *plaintiff* should, at an early stage, set forth, either orally or in writing, for the information of the Court or Judge, the following (amongst other) matters:—

1. His own name and designation.
2. The name (and sometimes designation or residence) of the person (if any) of whose act or default (actual or threatened) he complains.
3. The subject-matter of his complaint.
4. The relief or remedy which he claims from the Court or Judge.

It is impossible that any further proceedings can be taken unless it may be inferred, from one or more of the matters so set forth, that the Court has jurisdiction to entertain the complaint. Thus arises what may be called *the preliminary question of jurisdiction*. And I shall first consider this question according to the rules adopted by the Scotch Courts; premising that, according to the Scotch form of procedure, the question of jurisdiction is very often raised and brought to issue at this preliminary stage; whereas in the English system, the facts inferring jurisdiction are, at this stage, most commonly assumed without inquiry, and the question (if any) of jurisdiction must be raised at a later stage of the proceedings.

It will be convenient, for the purpose of connoting the various grounds on which jurisdiction may be asserted, to employ the following expressions, viz.:—1. *Forum actoris*; 2. *Forum rei*; 3. *Forum delicti* or *rei gestae*, and *rei sitae*; 4. *Forum remedii*.

1. *Forum actoris*.—The jurisdiction of the Scotch Courts has, in the general case, little to do with the territorial relations of the pursuer; whether domiciled in Scotland or out of it, whether resident in Scotland or not, whether a British subject or not, the Courts of Scotland are equally open to him. The only exception is, when there is something peculiar to the nature of his claim which directs the attention of the Court to the nature of his connection with Scotland, or to his *status* as a British subject; for instance, when he sues as pursuer in an action of divorce, or when he brings an action for declarator of rights to heritage, which cannot be held by an alien. In actions of divorce, and in other actions of *status* between husband and wife, the domicile of the wife is that of the husband, so that the defender's domicile is that of the pursuer. The *forum* in these actions is, therefore, that of both parties. But these cases may be more conveniently discussed under the head *forum rei*, and subsequently to the statement of the most general grounds of jurisdiction in ordinary actions.

This may, however, be the most convenient place to introduce a collateral topic. If, at the time of raising an action or of any other step of procedure in the Court of Session, the pursuer is within Scotland, no defender or other party is entitled to require production of the mandate under which an agent or procurator, duly qualified to practise in the Court, assumes to act on the pursuer's behalf. There is, for the purposes of the action, a presumption, *juris et de jure*, of the procurator's authority (*Young v. List & M'Hardie*, 24 D. 589). But when the pursuer is *further of Scotland*, the presumption ceases to be *praesumptio juris et de jure*, and the adversary is entitled to require production of a written mandate (case of *Ardchattan*, referred to by Lord Ivory in his note to *Ogilvy v. Scott*. See report of *Ross v. Shaw*, 11 D. 987, 992-3).

If the pursuer is *resident out of Scotland* at the time of raising the action, or during the litigation ceases to reside in Scotland (*Shedden v. Patrick*, 15 D. 379), a mandate of a somewhat different nature, and for a different purpose, is often required. The defender is then

without the security which he would otherwise have of being able, by personal diligence, to enforce payment of any costs which may be awarded in the action. In this case, therefore, the defender is generally entitled to require from the pursuer that a person resident in Scotland, duly authorised as his mandatary, shall be conjoined or sisted as a pursuer in the action, so as to be answerable to the defender for any costs which may be awarded. I have said the defender is *generally* entitled to this, for the Court will be guided in each case by the circumstances, whether they will enforce or dispense with the acquirement of a mandatary.

A confusion of thought which has sometimes occurred, must be here guarded against. The same mandate may, and commonly in practice does, serve both the purposes above mentioned. For the agent or procurator who conducts the cause not unfrequently himself accepts the position of mandatary in the more burdensome character of a party to the action. But this is not essential. For the mandatary of the pursuer (if not himself qualified as a procurator) would have implied in his commission the power to employ, as procurator, a person duly qualified (*More's Lectures*, vol. i., p. 181). And although a person duly qualified as a procurator hold the pursuer's express mandate to conduct the cause, he is not necessarily the mandatary in the more burdensome sense. For a special mandate may be given to some other person for the purpose of becoming a party and being answerable for the expenses.

Bearing in mind the double purpose of the mandate, as above explained, we shall hold a clue to the principle on which the Court will in any case act, in enforcing or dispensing with the requirement of a mandatary. Thus, where the pursuer was resident and carrying on business out of Scotland, he was held bound to sist a mandatary, although he offered to find caution to attend all the diets of the Court (*Railton v. Mathews*, 6 D. 1348). But where the pursuer, a domiciled Englishman, had lately come to Scotland, and judicially stated his intention of remaining and of taking a house there for his family, the requirement to sist a mandatary was not enforced; but he was put on terms, of undertaking at all times to leave his address in possession of his agent in the cause, so that upon inquiry at the said agent's office the defender might at any time ascertain where he was to be found (*Faulks v. Whitehead*, 16 D. 718). A petitioner for liberation under the Bankrupt (Scotland) Act 1856, being detained in prison in England at the instance of a creditor, has been held not bound, on the requirement of the detaining creditor, to sist a mandatary in the process in Scotland (*Robertson v. De Salvi*, 19 D. 996, c.f.; *Overbury v. Peak*, 1 Macph. 1058). When the pursuer is a proprietor of lands in Scotland, and is residing furth of the country, the question whether he may be required to have a mandatary conjoined or sisted as a pursuer, depends on the circumstances of the case, and must be determined *ratione habitæ* of the value of the property and the probable expenses of the action (*Caledonian & Dumbartonshire Rail. Co. v. Turner*,

12 D. 406). Where a married woman residing out of the country, apart from her husband, without any judicial order of separation, pursues an action of *status* against her husband, who is residing in Scotland, she cannot be required to sist a mandatary for the purpose of being responsible for costs (*Campbell v. Campbell*, 17 D. 514). But the case may be different when she is pursuing a claim of property relating to her separate estate (*Taylor v. Kerr*, 8 S. 151).

The summons should be raised in the name of the pursuer and his mandatary. But an agent conducting the cause, who has allowed his name to be inserted in the *partibus* and revised condescendence, as mandatary, will not be allowed to slip out of liability, on the ground of there being no interlocutor or formal minute sisting him (*C. v. B.*, 22 D. 1090). It was at one time doubted whether diligence on a liquid obligation could competently proceed at the instance of a party resident furth of Scotland, without the concurrence of a mandatary. But it has been held that a charge, as well as the protest of a bill, is competent at the instance of the creditor alone; and it is sufficient, after a note of suspension has been presented and ordered to be answered, that a written mandate be received from the charger, and that answers be put in and the subsequent proceedings conducted in the name of the charger and mandatary (*Ross v. Shaw*, 11 D. 984).

I must here mention an odd judgment of the late Lord Justice-Clerk Hope, concurred in (of course) by Lord Murray, with a doubtful assent by Lord Wood, but *dissentiente* Lord Cowan, which seems to the effect that a mandatary may be constituted without a mandate. But no person having been found willing to sist himself in the equivocal position so suggested, the interlocutor became inoperative (*Elder v. Young*, 16 D. 1003).

If the mandatary be a person of the same condition in life with his constituent, and not bankrupt or insolvent (*Harker v. Dickson*, 18 D. 793), nor protected from diligence by living in the Abbey, it is not relevant to inquire further as to his means or ability to pay costs if awarded against him (*Duncan v. Duncan*, 8 S. 641; *Railton v. Mathews*, 7 D. 105; *M'Kinlay v. M'Kinlay*, 11 D. 1022).

When a pursuer resident abroad, who is conducting a process with the aid of a mandatary in Scotland, dies, the mandate of course falls. But the mandatary remains liable for the expenses already incurred, and the competent course for the other party in order to recover these expenses, is to intimate the process to the representatives of the deceased pursuer, and if they fail to appear, to take decree against the mandatary for the expenses (*Cairns v. Anstruther*, 1 D. 24; *Marshall v. Connon*, 21 Jurist, 63).

When an action is raised at the instance of joint pursuers, one of whom is abroad, it is not in all cases necessary that the one who is abroad should have a mandatary in Scotland for the purpose of being responsible for costs (*Antermoney Coal Company v. Wingate & Co.*, 4 Macph. 544; *Rob's Trustees v. Hutton*, 4 Macph. 546).

To conclude this subject of mandate and mandatary. What has

been said in reference to the pursuer applies, *mutatis mutandis*, to a defender who appears in the action. If abroad, his procurator may be required to produce his mandate in writing; and if resident out of Scotland, he may be required to sist a mandatary as a joint defender in the process. The extent of the liability of the defender's mandatary is not clearly laid down by authority; but there can be no reason to doubt that he will be liable for the costs as between party and party (*Robb v. Indept. Midx. Insurance Co.*, 5 D. 1025; *Trodden v. Sweetman*, 24 D. 1360). A defender has been held bound to sist a mandatary other than his co-defendant (*Barton v. Smith*, 13 D. 854).

The above rules with regard to parties out of Scotland and persons resident out of Scotland apply to the Inferior Courts as well as to the Court of Session, with this difference, that the presumption as to the procurator's authority is not, in the Inferior Courts, a *praesumptio juris et de jure* (*Menzies v. Caldwell*, 12 S. 772); and it is a familiar rule of practice in the Inferior Courts, that when a defender appears by a procurator, the adversary is entitled to require production of the procurator's authority. This may be satisfied either by a written mandate or by the service copy of the libel, the possession of which is equivalent to a mandate. But with regard to the requirement of a mandatary for the purpose of being answerable for costs, the rules with regard to persons resident out of Scotland, are the same in the Inferior as in the Superior Courts.

2. *Forum rei*.—The ground of jurisdiction most generally adopted by Courts of law in Scotland is afforded by the rule—*Actor sequitur forum rei*. The jurisdiction is determined by the defender's relation to the territory. That relation may be of the following kinds:—(a) Domicile; (b) Residence; (c) Resort for business; (d) Actual presence; (e) Origin (including the nationality or quasi-allegiance implied in the term "Scotchman").

(a) *Domicile*.—The word domicile, in its emphatic and proper acceptation, is nothing else than *house and home*. It is described by Erskine (Inst. i. 2, 16) as "the dwelling-place which a man chooses for a fixed abode to himself and his family." The definitions which have been given of the word in modern times are all based on the celebrated one of Justinian's Code l. 7, de Incolis (x. 39):—"Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde quum profectus est, peregrinari videtur, quod si rediit, peregrinari jam destitit."

Domicile is constituted *facto et animo*. The *fact* is a dwelling-place having the outward aspect of a permanent habitation. The *indicia* of such an habitation are various. Property or tenancy of a permanent character in the house occupied would be an element. But this is not necessary. Neither is it sufficient (*Udny v. Udny*, *infra*). Neither is the term of tenancy so important an element as the plenishing of a house with one's own furniture and goods; and

especially the accumulation therein of that endless variety of personal and family chattels which may be called the *lares* of a modern home. It is, above all, essential to the constitution of a domicile that it be the dwelling-place of the family—the wife, children, or other relations who complete the familiar and accustomed household. The *animus* or *intention* which must combine with the *fact*, in order to constitute a domicile, is not difficult to indicate or describe. The words of Erskine—“*chooses* for a fixed abode to himself and his family”—appear to hit it off exactly. But the proof of the intention is often extremely complicated, owing especially to the circumstance of its being raised after the death of the person whose domicile is in dispute.

Another meaning of domicile must be assigned as complementary to that above given. The domicile above described is the *domicilium habitationis*, or domicile of abode and choice. There is also the *domicilium originis*. It is now well settled by our law, in conformity with the opinion of juriconsults learned in such questions, that a man must have some domicile, and that he can only have one domicile. But we cannot always assign the domicile of abode and choice. For since it is constituted *facto et animo*, what if the *fact* or the *intention*, or both, fail; or if circumstances render the combination of fact and choice impossible? There are many who—by reason of professional avocations (*e.g.*, that of a soldier or sailor), or through the necessity or the desire of seeking a fortune abroad—are in fact without a dwelling-place having the aspect of a permanent home; or, if they have a dwelling-place with much of the outward appearance of a home, retain a fixed and settled *animus revertendi* to the region of an older and more favourite home. And there occur in the lives of many of us times when a home is “broken up,” and an interval, longer or shorter, takes place during which it cannot be said that we have acquired a new home. In these cases the domicile of habitation or choice is supplemented by the *domicile of origin*. This is simply the domicile of the father, if the person whose domicile is in question was born in lawful wedlock; if otherwise, of the mother. The legal hypothesis is, that the domicile of origin is always at hand to supplement or stand in stead of the domicile of habitation. The domicile of origin remains as the domicile until a new domicile of habitation is established. If a domicile of habitation, not being the domicile of origin, is abandoned, the domicile of origin revives and continues, unless and until a fresh domicile of habitation is established. These principles, which have long been current amongst writers of reputation upon international jurisprudence, have lately been very clearly laid down by the authority of a judgment of the House of Lords, supported by concurrent opinions of the Lord Chancellor (Wood), and Lords Chelmsford, Westbury, and Colonsay (*Udny v. Udny*, June, 1869. Law Rep. H. of L. App. Sc., vol. i., p. 441).

To avoid any misconception as to the sense in which I employ the word domicile, I will here observe that I repudiate entirely that

spurious use of the word which has been sometimes loosely employed in questions of jurisdiction, and which is implied in such terms as *forensic domicile* and *domicile of jurisdiction*. This employment of the word may have been convenient for the purposes of argument or judgment in those questions. It is unnecessary and would be misleading, in an essay purporting to expound legal principles. As I shall presently show, jurisdiction may be founded on domicile in its emphatic and proper acceptation. Jurisdiction may also be founded on residence, and other circumstances distinct from domicile. It is essential that this distinction be recognised, in order that the grounds of jurisdiction may be clearly described.

Another spurious use of the word domicile, which must be mentioned for the purpose of being avoided, is that which is involved in the expressions, *matrimonial domicile*, or *domicile of marriage*. These expressions appear to have been employed to denote the abode or domicile which the law fixes on the wife in pursuance of the maxim, that "her abode and domicile followeth" that of the husband. But abode or residence is one thing; domicile, though it connotes abode, is another thing. From the principle that the husband is entitled to choose the place of residence where he shall dwell with his wife, it follows, by a useful presumption of law, that his domicile of abode and choice must be hers. But if the expressions are intended to denote any residence other than that which, by reason of the *animus remanendi*, constitutes a true domicile, they are unnecessary and misleading; and I altogether repudiate these expressions, so far as they are intended to denote any other domicile than that which, being the true domicile of the husband, is also figured in law to be that of the wife.

Domicile, then, has two proper acceptations, which are complementary to one another, namely, the domicile of *habitation*, or the domicile of *abode and choice*, and the domicile of *origin*. The two acceptations being complementary to each other, the word cannot be ambiguous. I employ the word *domicile* in these two alternative acceptations, and in no other, and I utterly reject any acceptation of the word which shall attribute to it one meaning in questions of succession, and another meaning in questions of jurisdiction, or in any other questions.

To make the notion of domicile more clear, I shall, in my next paper, collect from some of the more recent cases a slight outline of the species of facts which have been deemed most important in fixing the domicile, and evidencing its relinquishment or the acquisition of a new one.

R. C.

THE HABITUAL CRIMINALS ACT 1869.

MORE than the usual amount of talk, both within and without the walls of Parliament, accompanied the passing of this measure into law. By some it was condemned as an unprecedented interference with the "liberty of the subject," while by others it was praised as a comprehensive and practical, although admittedly a somewhat strong, remedy for the alarming increase of crime, especially among habitual offenders. The ingenuity of the framers of the statute seems to have been exhausted in settling the general principles which it was intended to embody, as they have left the provisions for the carrying out of its details by Judges, magistrates, and police authorities generally, in a state of perplexing confusion. The Metropolitan magistrates saw this, and complained of it within a few weeks after the rising of Parliament, and now that the attention of our Scotch local Judges has been specially called to the subject by a circular addressed to them by the Home Secretary, the result of their deliberations is that they recommend to Procurator-Fiscals and other executive officers of the law to "let well alone," to abstain from putting the Act in force. A lame and impotent conclusion has indeed been reached when a committee of seven Sheriffs reports in regard to a statute (passed for Scotland as well as England) in such terms as these—"Its provisions are so obscurely worded as to render it probable that it will give rise to processes of suspension before the Supreme Court, and perhaps to actions of damages." If this opinion is well founded—and we shall be able to shew that it is—one cannot help thinking that the time and experience of the seven Sheriffs might have been employed more profitably for the public service, had they been asked to revise the measure while yet in draft or in its passage through Parliament. We should not in that case have had to record one more abortive effort in Scotch legislation.

The first difficulty meets one in the "interpretation" or "definition" clause. "Chief officer of police" is declared to include certain officials in the metropolitan police district, the London city force, and Dublin force respectively, "and elsewhere" chief officer of police "shall include any of the following persons," viz.:—in England so and so, and in Ireland so and so; but Scotland is omitted altogether. Had this clause not been inserted at all, we would probably have correctly assumed that our chief constables and superintendents are "chief officers of police," but as Scotland is surely comprehended in the word "elsewhere," and as none of the persons declared to be "chief officers" in "elsewhere" have any existence in Scotland, we must assume that our head constables are not, for the purposes of this Act, "chief officers of police." This omission renders it apparently impossible in Scotland to carry out the provisions of the third section of the statute, which is intended to enable ticket-of-leave men to be taken into custody without warrant, when there is reason to believe that they are getting a livelihood by dishonest means.

The object of the second part of the statute is to establish a register in London, by which the London police force, and through them the police throughout the country, shall be able to identify all criminals who have been convicted in any part of the United Kingdom. The returns from which the register is to be framed, and which are to be made up by prison governors, and "chief officers of police," are to give information "with respect to persons convicted of *crime*." "Crime," however, is defined, for the purposes of this part of the Act, to be "any felony, or any offence not a felony, specified in the first schedule." The first schedule is in these terms:—"Any felony not punishable with death also, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or misdemeanour under the 58th section of 24 and 25 Vict., cap. 96." Now, in the first place, the words "felony" and "misdemeanour" are not Scottish law terms, and our Courts cannot interpret them. In the second place, the 122d section of the Act 24 and 25 Vict., cap. 96 (the Larceny Act), declares that that statute does not extend to Scotland; and, in the third place, it seems plain, from the terms of section 8, that the first schedule of this Act is not intended to apply to Scotland at all.

The third part of the statute contains provisions for subjecting persons convicted of certain offences to the supervision of the police for limited periods. It applies to "any person *convicted on indictment* of any offence specified in the * * * second schedule hereto in Scotland." The second schedule is in these terms, "robbery, theft, assault with intent to rob, stouthrief, falsehood, fraud, and wilful imposition, obtaining goods or money by false pretences, uttering false or counterfeit coin." In Scotland, all of these offences, except robbery, may be, and generally are, tried by Sheriffs. But no person can be tried by a Sheriff *on indictment*. The result is that no one can be put under police supervision, however often convicted, unless his trials shall have been before the Court of Justiciary. It is also a noticeable defect in the schedule that it makes no mention of the crime of reset of theft.

There are many minor defects, of which we can only give one or two examples, although their consequences are by no means trivial. What do we know in Scotland of "recognizances" (sec. 10), or of convictions for "assault and battery" (sec. 12)? The 14th section provides that the forms set forth in the *second* schedule are to be used, but the second schedule contains no forms; they are to be found in the *third* schedule. Further, the important functions of the Procurator-Fiscal seem to have been left out of view altogether. It is "a constable or police officer" who is to prosecute under the 8th section, an innovation which cannot be too strongly condemned; and finally, an accused person may be sentenced to a year's hard labour without any written complaint being presented to the magistrate, and without any record of the evidence being kept.

It is happily of but little consequence to the administration of the criminal law in Scotland that this statute turns out to be quite unworkable and useless. The class whom it is intended to reach is scarcely known out of Edinburgh and Glasgow, and is numerous only in the latter city. But it is a grievous misfortune and disgrace that an enactment should have received the Royal assent which, in so far as Scotland is concerned, bears on the face of it blunders so gross that they must have arisen either from great ignorance or most culpable carelessness. It is to be hoped that the Report which the Sheriffs have printed will find its way to the Lord Advocate's chambers and to the Home Office.

We have received from a valued correspondent the following letter on the same subject, for which, though in type, we were unable to find room in last number:—

SIR,—This important measure became law last Session. I do not propose to discuss its policy, which is probably most sound; it is with the letter of it, not the spirit, that I have now to do. My purpose is to point out some incoherencies resulting from the carelessness of the persons concerned in its ultimate revision for press; no light matter surely, since whatever the Queen's Printer puts into the Statute Book becomes thereby binding upon the lieges.

The statute begins, as usual, by a definition of terms. "Chief Officer of Police," it is then said, shall mean certain persons in London and Dublin, and shall elsewhere include the following persons:—

"In England, any chief constable, head constable, or other chief officer of police, or of a division of police, by whatever name such chief officer may be called; the expression '*stipendiary magistrate*' shall include a *metropolitan police magistrate*; and in Ireland any inspector, sub-inspector, head, or other constable of the Royal Irish Constabulary acting as chief officer of constabulary within any district or town."

It is manifest that the words I have italicised are in the wrong place. As they stand, they raise any member of the Royal Irish Constabulary to the dignity of a stipendiary magistrate. For Scotland, the "Chief Officer of Police" is not defined at all.

The second part of the Act provides for the registration of criminals. A register is to be kept in London, and another in Dublin. No register is provided for Edinburgh; but in order to make the London register complete, section 6 provides that

"The gaolers or governors of county and borough prisons, and the chief officers of police in any county, borough, and other place in the *United Kingdom* which maintains a separate police, shall from time to time make returns," etc.

It is plain that under this prescription, the governor of the prison of Edinburgh is liable to make returns to make the London register complete. But in the immediately preceding section (5) the London register is limited to persons "convicted of crime in England."

Here is another incoherence. The first schedule of the statute contains an enumeration of certain offences to which some of its prescriptions apply. These offences are described in the technical phraseology of the English law. But as the statute was intended to apply to the whole of the United Kingdom, a second schedule became necessary, describing the same offences in the technical phraseology of the Scotch law. Thus the original schedule *two*, containing various forms of warrants, etc., became, by this interposition, schedule *three*. Mark the result. Section 14 of the Act is as follows:—

"The forms set forth in the *second* schedule to this Act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and when used, shall be deemed to be valid and sufficient in law."

You turn to schedule *second* for your forms of warrants, etc., and you find there—

"Robbery, theft, assault with intent to rob, stouthrief, falsehood, fraud, and wilful imposition, obtaining goods or money by false pretences, uttering false or counterfeit coin."

It reminds one of the old fireside game of "cross questions and crooked answers."

Out of the same interposition of a Scotch *second* schedule, and forgetfulness to adapt the original provisions of the statute thereto, two other serious difficulties have arisen.

Part II. of the statute relates to the Registration of Criminals. But section 7 limits such registration to

"Any felony, or any offence not a felony, specified in the *first* schedule hereto."

Are criminals convicted of crimes in *second* schedule not liable to registration?

Again, Part IV. of the statute relates to "receivers of stolen goods." Obviously this is a very important provision; for on right legislation with regard to receivers of stolen goods, right legislation with reference to habitual criminals must, to a very great degree, depend. Now all this portion of the statute, consisting of one long section, is made applicable only when a person has been previously "convicted of any offence specified in the *first* schedule hereto, and involving fraud or dishonesty." That *first* schedule is expressly limited to England by section 8th. Consequently a most important portion of the statute is, by mere oversight, made inapplicable, or of very doubtful application, to Scotland. The provision in the body of the statute should have been—"in the first and second schedules hereto."

Whom shall we hang for these legislative blunders? I do not feel concerned to answer that question. But surely some measures should be taken to prevent their recurrence.

F. H.

JOHN HUNTER, W.S., LL.D.

PROBABLY one of the most gifted by nature, and certainly one of the best and most accomplished men whom this generation of Scotchmen has produced, has passed finally from amongst us since our last number appeared. John Hunter, late Auditor of the Court of Session, who for the last three years has been lost to the profession and even to his intimate friends, died at Craigcrook on the 3d December. The external features of his uneventful, but, till recently, happy and prosperous life, are generally known; and, on his retirement from his office, we endeavoured to express the high estimation in which he was held as a professional man and a public servant. We must now attempt, in as few words as we may, to convey to those of our readers who had not the privilege of knowing him privately, some conception of his personal character, and of the position—in some respects a very remarkable one—in which he stood to a wide circle of friends and acquaintances. The function of an adviser was that for which John

Hunter seemed to have been specially designed by nature, and the extent to which he was called upon to exercise it would exceed the belief of any one who had not personal means of knowledge. "Before we go farther in the matter, might it not be as well to hear what the Auditor has to say about it?" was a sentiment which everybody experienced and in which everybody concurred; and to the Auditor accordingly everybody went, about everything. Apart altogether from professional awards, it would probably not be too much to say that scarcely a day passed in which he did not give opinions in half-a-dozen matters, of grave importance to others, (for he was by no means weakly or foolishly patient of trifles), but in which he himself had no farther interest than that of an unusually sympathetic and enlightened bystander. For the exercise of this priceless office of friendship Mr Hunter possessed, as we have said, qualities rarely united in the same individual. His own temper was bold and sanguine. His sympathies were always on the side of honest zeal. His very look was reassuring. He never wavered in his confidence in the ultimate success of what he felt to be right, or in the ultimate acceptance of what he knew to be true. His mind was singularly open to new ideas. He was contemptuous of ridicule. On the other hand, however, no man was more alive to the fact that ends must be accomplished by means; or more prepared for the narrowness which everything that is generous, and the shallowness and obtuseness which everything that is recondite or refined, must encounter in the first instance. It was this latter quality that enabled him to draw the line with so much security between what was desirable and what was possible; and, though the least time-serving of mortals, to be so seldom associated with schemes that were unsuccessful.

The accidents of his birth, as the son and grandson of St Andrews professors on both sides of the house, and of a double matrimonial connection with the Jeffrey family, coupled with personal tastes, hereditary and acquired, rendered him peculiarly the friend and counsellor of men of letters. The benefits which, in this capacity, he conferred upon literature and learning indirectly, may well console us for the regret that his personal contributions to it were so few. The discharge of this duty—for as such he really regarded it—called for the continual exercise of acquisitions of the most substantial kind; and those who—knowing only his exquisite taste for poetry, and the rich stores of appropriate quotations with which he was in the habit of adorning his conversation—regarded him, apart from his character as a business man, simply as an accomplished *dilettante*, formed an altogether inadequate conception of him. He was one of the few men we have ever known, and certainly the only man of business we ever knew, who was in a condition to converse with men of learning on their specialties, and to aid them with his suggestions. His apprehension was so rapid that a very few minutes of conversation sufficed to bring him up to the point with which the inquirer was occupied at the time; and then,

ten chances to one, he would say something that was well worth listening to. Let us give a single example. We happened on one occasion to mention to him that the latest speculators on scientific jurisprudence in Germany had altogether repudiated the favourite distinction between perfect and imperfect obligations; and that they held it to be nonsense in every other sense than as a distinction between obligations which are and those which are not enforced by positive law for the time being, in which sense, of course, it is a line that is continually shifting. "Yes," he said, "and it is nonsense in that sense also, because it is needless." "Such," we said, "is precisely the view of the writers to whom we referred, and which we ourselves adopt; but has any Scotch writer ever called it in question, and will it not be felt as a terrible wrench by most people if we insist on their parting with so cherished a theory?" "One writer," he said, "and one only, so far as I know, has repudiated it expressly,"—and he ran away at once and turned up Dr Thomas Brown's ninety-first lecture. Hundreds of similar instances could be given in departments far more widely apart from his habitual lines of thought and study.

Our readers may imagine the grief and surprise which overtook the wide circle of Mr Hunter's friends when it began to be apparent that he was no longer what they had known him. One naturally looks for some assignable cause for the sudden and premature decay of a mind so strong, so clear, and so sane. The death of his eldest son, a very fine and promising young man, had affected him deeply; but otherwise all was serene around him. Nothing could exceed the happiness of his domestic circle; he was beloved and honoured by his friends; he dwelt amid the bowers and blossoms of that beautiful Craigcrook, which the habits and associations of a lifetime had made his own. His official duties and his private practice were arduous, no doubt; his day's work was a hard one; but it did not seem too hard for him, and he "sweetened it," as he used to say, by reading poetry in the morning, and wiped away its irritations and fatigues by walking on the hill or playing bowls on the green in the evening, and cutting for his friends handfuls of those wonderful yellow roses which grow at Craigcrook as they grow nowhere else. A contemporary has suggested that the premature development of his faculties, caused by the early age at which he was sent to college, may have sown the seeds of those ailments by which they were so suddenly eclipsed. It may have been so. That any one should enter an university at ten and quit it as a graduate at fifteen, does appear a hazardous anticipation of the labours and honours of riper years. But, on the other hand, we must remember that similar facts are recorded of many of the greatest men that ever lived; that the days of whiskered school-boys had not yet arrived; and that his position was such as greatly to favour his early advancement. Certain it is that he looked back to his well-spent college days, to the prelections of his famous grandfather, and the beloved companionship of his life-long friend, Dr Craik, with the liveliest pleasure in after life. If any period of his career

was to be deplored, it has always seemed to us that it was that which immediately followed. That such a youth as John Hunter must then have been, should have been bereft of those *wander-jähre*, which proved so fruitful to most of us, and, without a breathing-time for rest and enjoyment between boyhood and manhood, should have been chained to the stool of a writer's office, and compelled to earn no insignificant part of his livelihood by copying law papers at 3d. a page, does seem a miserable waste of the higher powers of life and energy. Had the circumstances of his family been such as to admit of his devoting the five years between fifteen and twenty to the cheerful and uninterrupted prosecution of the studies which he had begun so well, and which under every discouragement he carried on so manfully, Scotland, in all probability, would have had another star in her intellectual firmament, for which future men, alas! will search in vain.

J. L.

Reviews.

Digest of Cases Decided in the Supreme Courts of Scotland from 1800 to 1868; and, on Appeal, by the House of Lords from 1726 to 1868. Being a new Edition of the Digest, from 1800 to 1852, by Mr SHAW; and from 1852 to 1862, by Messrs MACPHERSON, BELL, and LAMOND, Advocates. Revised, Consolidated, and Continued to 1868, by ANDREW BRATSON BELL and WILLIAM LAMOND, Advocates. Edinburgh: T. & T. Clark, Law Booksellers.

MESSRS BELL and LAMOND have now finished their labours in the driest and most fatiguing, but not the least useful, department of legal bookmaking; and the lawyers of Scotland owe them much for the precious hours which their useful volumes will save. It is almost superfluous to review a work which no lawyer can want, and which is already on the shelves of most of our readers. But it would be unfair to the publishers and authors to pass over without a few kindly words a work of such magnitude and importance. The first and most obvious advantage of a digest is to substitute one dictionary for the indexes of many volumes; and the special use of the present edition is, that we can exhaust the cases on any subject by turning to the proper place in its pages, instead of ransacking the three different series of Mr Shaw's Digest, the indexes of six volumes of Session cases, sundry volumes of criminal law and House of Lords reports, not to speak of the *Scottish Jurist*. But it is scarcely less important to have all the cases classified in the same way, and in some degree on the same principles, however defective the arrangement may be. The editors of the various volumes of reports have not invariably placed the various classes of cases under the same headings; and even in the different series of the former Digest itself some differences of

arrangement are found. We regret, indeed, that editors so well qualified as Messrs Bell and Lamond have not gone further in remodelling and re-arranging Mr Shaw's editions. Mr Shaw's classification was, as Mr Bell says in his preface to this edition, "excellent in itself, and it has "grown familiar, by constant use, to all Scotch lawyers," and they have therefore retained, with few modifications, the plan adopted in the fourth volume. Mr Shaw's plan was certainly as good as could well be expected at that time, and his books have not only entitled him to the warmest gratitude of the last generation of lawyers, but must necessarily remain the basis of future digests. Yet no one can be in the habit of consulting the digest without observing a multitude of defects—cases inserted under heads or sub-titles not the most appropriate, classifications altogether illogical, want of cross-references (a want unluckily aggravated rather than supplied in the present edition), and in some long and important headings, a mere semblance of subdivision, which either gives no aid or misleads. The very merits of the present edition increase our regret that the editors were not more ambitious. Instead of forming their book on the plan which Mr Shaw laid down in 1842, they might, as we recommended in 1863, have adopted a more philosophical and comprehensive system, which would not only have aided the future codifier, but would have familiarized the practising lawyer with a more scientific method. That the editors would have encountered many difficulties in such an undertaking cannot be denied; and we must own that the Scotch lawyer reaps for labours of this kind such a scanty meed either of honour or of more substantial rewards, that there is small encouragement to undertake such a work as we, perhaps not quite disinterestedly, desiderate.

But to pass from what might have been if Scotch lawyers had been more numerous or more wealthy, we observe that in this new edition all the improvements first introduced in the fourth volume of the former digest have been continued and extended to the whole work. Thus, the unmeaning title, "Clause," has been abolished and the cases removed to their appropriate heads. "Coal" is put under "Lease" and "Superior and Vassal;" "Exclusive Privilege" has been cut up into "College," "Copyright," "Corporation," and "Patent;" "Error," "Domicile," etc., have been made new heads, and many other improvements have been effected which it is unnecessary to particularize. The changes now introduced for the first time consist in the omission of a variety of needless repetitions—*e.g.*, in the heads "Arrestment" and "Competition." An appendix contains all the cases decided while the work was going through the press down to the end of 1868. If a lawyer were condemned to practise having only one book in his possession, few, we think, would hesitate to choose the Digest of Messrs Bell and Lamond as that one.

Styles of Writs, Forms of Procedure and Practice of the Church Courts of Scotland. Revised and Adapted to the present state of the Law of the Church. By the Rev. J. COOK, D.D., Minister of Haddington, Principal Clerk of the General Assembly of the Church of Scotland, Fourth Edition. Edinburgh: T. & T. Clark, 38 George Street. 1870.

Treatise on the Parochial Ecclesiastical Law of Scotland. By JOHN M. DUNCAN, Advocate, Author of "Digest of Entail Cases," and "Manual of Summary Entail Procedure." Second Edition. Edinburgh: Bell & Bradfute, Bank Street. 1869.

THE clergyman who has these two books on his shelves, along with (if he is somewhat more ambitious of a legal reputation) Guthrie Smith's Poor Law Digest, possesses a very tolerable law library, and, if he makes a good use of them, may pass for a very considerable authority in all questions of presbyterial and parochial law. The times are changed since the ecclesiastical lawyers filled the largest tomes with their endless divisions and sub-divisions, their hairsplitting distinctions, and their marvellous refinements and (we must add when we remember some of them) defilements. Then, it was necessary to seek for a good lawyer among churchmen; now, people go to what is facetiously called a church court when they want to see a court of law, which not only sets all law at defiance, but is incapable of comprehending the simplest matters in the catechism of natural justice. The first of the books at the head of this paper is entirely, and the second is in some measure, intended to ameliorate the condition of the clergy in respect to legal ideas; but we are not sure that either of them, ably, and in all respects adequately, as they are conceived and written, have quite set about that task in the right way. In order to enable sessions and presbyteries to apply the valuable learning and use the guidance which Dr Cook and Mr Duncan offer them, there is still room for an elementary manual of juridical conceptions and legal axioms, a miniature "Erskine's Principles" of Church Law, lisping in law, a volume of "milk for babes" not too strong for the weakest digestion, prophylactics for clergymen against the eloquence of the small lawyers who break loose into general assemblies and the more dangerous casuistries of clerical jurists. For while the legal knowledge of the average clergyman cannot be too slightly estimated, and is seldom much increased by even a life-long experience of church courts, we are far from denying that a few clergymen—one or two in a generation—are able jurists, who either from the natural bent of their minds, or from careful study, not only understand legal principles, but can conduct a legal argument or deliver a legal judgment admirably. Unfortunately, in the present state of the clerical intellect, such powers are not an unmixed good. They tend to become but another weapon in the hands of partizanship and prejudice, and even the best of men and of ministers may avail himself of the immense superiority which they give him to promote some favourite policy, or destroy some

fancied foe of orthodoxy. The remedy for such dangers is to be found, if church law is still to be administered in Scotland by unprofessional lawyers, by awakening in the clergy not only a more lively sense of natural justice, but, as one means towards that end, by making law a part of their university education. A session's attendance at a course of lectures on church law would do far more for divinity students than to make them understand about augmentations and grass glebes, the relevancy of libels, and the jurisdiction of church judicatories; it would open the mind of many a budding Boanerges to the principles of common sense and fairness by which men are guided in the ordinary affairs of life, not to speak of teaching him "the principles of eternal justice." May we not hope for the institution of such a chair in these days of University Reform? Will not the General Assembly direct the procurator of the church or its learned principal clerk to deliver, *ad interim*, an annual course of lectures to students of divinity, on elementary jurisprudence and ecclesiastical law? Will no society for the Augmentation of Useful Knowledge in the Church of Scotland, or for the Relief of Ignorant Clergy of all denominations, take the matter up earnestly?

Pending the inauguration of such a movement, we can do no better than inculcate on the worthy order of men in whose interest we have been writing, the diligent study of the books before us, with such lights and such powers of mind and conscience as they already possess. Of Dr Cook and Mr Duncan we need hardly speak in terms of praise, for the general voice has already declared their books indispensable to the church and parish lawyer. In a book of styles such as the former has elaborated, there is little room for the sins by which clerical jurists are most easily beset; but it has always been reckoned one of the great merits of Dr Cook's work (for although at first built on another foundation, it is now really his own), that he has avoided church politics, and has produced a book in which even a Free Churchman may find instruction and no offence. Only in one or two places throughout the book can anything like an expression of individual opinion, on questions beyond the domain of pure law, be detected by the keenest eye;* and everywhere an accuracy equal to that of a conveyancer, and the diligent study of the judicial decisions, have been combined with knowledge of church history such as few possess, to make this one of the best books of the kind, and the one authority in its own department. Most lawyers' books become

* Perhaps an instance may be found on page 10, where, speaking of the mode of election to the eldership introduced by Act X. of 1842, and afterwards abrogated in 1846, he says, "The nomination was thus transferred to the people, and the session placed in the somewhat invidious position of being compelled to vindicate the purity of the eldership by the rejection of parties unanimously approved of by the congregation." Most people will agree with Dr Cook in thinking this "a somewhat invidious position" for a kirk-session; yet not more so than many other officials occupy. The "invidious" office, moreover, would seldom have to be exercised in practice; and it is difficult to see that the session is in a less invidious position under the present law of self-election, which makes it a close corporation, and is one of the chief seats of weakness in the Church of Scotland. See also the last page.

authorities only after the authors are dead; but Dr Cook has had the satisfaction of seeing his work pass through repeated editions during his life, and attain a universality of deferential acceptance which makes him, while yet living, rank with the "dead masters of mankind."

It remains to notice the improvements which have been made in the present edition. So many Acts of Parliament affecting the law of the church have been passed since the last edition of the Book of Styles that a very considerable space has been required for their analysis and for giving the forms of procedure under them. These and other Acts have been given in full in the appendix, where, however, we desiderate the year or title of the Act at the top of each page, a great facility in consulting a book of this kind. The most important legislative changes which have called for additional chapters in the present edition are the Schoolmasters' Act of 1862, the Act of 1863 as to the Powers of Church Courts, the Glebe Lands (Scotland) Act 1866, and the Ecclesiastical Buildings and Glebes (Scotland) Act 1868. Considerable changes on the book have also been necessitated by the legislation of the church itself in regard to the curriculum of theological students. Altogether the book has been so materially altered and improved that the previous editions may properly be consigned to the waste-paper closet and replaced by the present issue.

In comparing Dr Cook's style of workmanship with that of Mr Duncan, we are constrained to admit that the superiority in conciseness and neatness of diction lies with the ecclesiastic, while the lawyer may justly claim the credit of greater fulness of detail (except, of course, in regard to the forms which are the *raison d'être* of Dr Cook's book) and larger richness of illustration from actual life as pictured in the cases. If we might hint an objection to Mr Duncan's book, it is that he has bestowed *too much* minute labour on the details of his work. An index, indeed, can hardly be too full, and therefore we have only admiration to bestow on the 56 pages of index of the matters contained in the 920 pages, including statutes, to which the book proper extends; on the 20 pages devoted to indexing by the names of parties the 927 cases cited in the book (many being cited four, six, or eight times); and on the novelty which Mr Duncan has introduced in the shape of an index of cases under the name of the *parish* in regard to which the question was raised. Perhaps it was needless to repeat the name of the parish in many instances in the index of matters; at least, it seems odd to find there such entries as, "Lochcarron, enlargement authorised in the manse of, 455," or "Peebles, case of, stated, 101." In the foot-notes we cannot but think that unnecessary space and ink have been bestowed in particularizing the Judges who gave the opinions founded on in support of the text, and in informing us *e.g.* in each case whether the present Lord President held his present office, or that of "Ld. J.C.," as Mr Duncan dubs him, at the time when such and such a dictum was uttered. This, however, if it be an error, is one on

virtue's side; and we should not have mentioned it, did we not think that many will deem it a merit, and that all will accept it as a proof of the scrupulous care which this writer has expended on every page, nay, on every line of the book.

As Mr Duncan's book is a second edition, the first large edition, issued in 1864, having been rapidly sold out, it cannot be expected that we should give any specimens of his handiwork. Much, indeed, has been added to that edition, and more has been re-written; but our readers have already had a sufficient sample of the new matter in the articles on "Heritors and their Meetings" in the *Journal* for January and February, 1869, which now form, with but slight alterations, the twelfth chapter of the book. We are glad to recommend the book as a safe and unfailing guide to all those who are concerned with any department of Parochial Law, whether it be patronage or church-building, church seats or lairs in the churchyard, augmentation of stipend, glebes, presbyterial jurisdiction in patrimonial matters, the powers of kirk-sessions in civil matters, schoolmasters, or even the functions of such inferior church officers as session-clerks and beadles. Nothing is forgotten that may be in any measure useful or interesting to the parochial mind.

The Law Magazine and Law Review; or, Quarterly Journal of Jurisprudence, for November, 1869. Being No. LV. of the New Series (and No. 165 of the Law Magazine). London: Butterworths, 7 Fleet Street. Edinburgh: Clark, and Bell & Bradfute.

THE first article is on the New York Penal Code, by Mr T. L. Murray Browne, who concludes by expressing a hope that "the Indian, rather than the American Code, will be regarded as the model for the future legislation of this country." It is followed by papers on Primogeniture, Imprisonment for Debt, the Irish Land Bill, and the Turnpike System. The longest article is on Reform in the Law of Patents, and the last is on Naturalization and Allegiance apropos of the Blue Book, and Sir A. Cockburn's commentary on it. We have no space for more than the expression of our opinion that this is a fair average number.

The Month.

The Vacancy on the Bench.—The Faculty of Advocates has passed a resolution declaring its opinion that the number of Judges in the Court as at present by law established is necessary for the efficient discharge of the business of the Court, and that the delay in filling up the present vacancy on the bench cannot be continued without impeding the proper administration of justice, and thus proving injurious to the country and the usefulness of the Court.

We deeply regret that the Faculty of Advocates did not boldly assign the reasons by which this opinion is justified. In 1840 when a similar proposal was made to reduce the force of the Supreme Court, not indeed by unconstitutionally refraining from filling up a vacancy in obedience to a howl from Glasgow, Dundee, and the self-sacrificing citizens of Edinburgh, but by the way of formal parliamentary action, a very different and more weighty protest was made under the guidance of Lord Colonsay, then a leader of the bar; and on that occasion an exhaustive inquiry before a Select Committee of the House of Commons ended in leaving things as they were. No doubt the mere opinion of the Faculty of Advocates is entitled to great weight from the character of the body; and it is supported by the unanimous concurrence of the Society of Solicitors in the Supreme Courts, a body which can have no selfish interest to serve by maintaining the number of the Judges at its present figure. We have as yet heard no reasons stated why the vacant seat on the bench should not be filled up; but let us ask what reasons the Faculty might have assigned for its contrary opinion, if on this occasion its thoughts had not been "too deep for words."

If we look to the recent history of the Faculty we cannot find much justification for the insinuation that this resolution can have little value because it is in accordance with the personal interests of its members. The Faculty has always shown a deep interest in all measures suggested for the improvement of the law and its administration, and its opportunities of judging of the defects of the existing law, and the machinery of the Courts, have from time to time enabled it to express its opinion in regard to such measures, with the greatest advantage to the country. In 1830, for example, very extensive reductions were made in the legal establishments of Scotland, whereby a saving of £50,000 a-year was secured to the country, nine judicial offices being abolished. The Faculty cordially supported the government in the reductions then effected, although most of the offices abolished were tenable only by members of their own body. And in recent times almost every project of law reform has received earnest support, and many have received their birth from this body.

We have not been able to discover any ground for supposing that the strength of the Supreme Court, as fixed in 1830 and 1839, is more than sufficient for the work it has to perform. The numerical returns of cases brought into Court and disposed of as at the commencement of the century and in more recent years, do not justify the inference that the Judges did more work then than they do now. The number of cases in the Court has undoubtedly been reduced by the improvements effected in the Sheriff Courts, and by the transference to them of much of the litigation which figures in early returns of the Supreme Court, as well as by the abolition of forms of process which gave unbounded opportunities for obtaining delay, and which thus caused a vast number of appeals, suspensions, and other proceedings to be taken for that purpose only. But notwithstanding

this numerical reduction, several causes have combined to prevent the labour falling upon the Judges from being diminished: First, the increasing complexity and importance of the questions arising for adjudication by the tribunals of a community many times more wealthy, populous, and busy than it was fifty or sixty years ago. Secondly, changes in the forms of procedure, such as the substitution of oral for written argument, which, while securing much greater attention and correctness of decision on the part of the Judge, and materially lightening the labours of counsel, have increased the judicial time required for the work of the Court; and, above all, the recent abolition of the system of taking proofs by commission, and transference of that duty to the Judges,—in itself an addition of probably two days a-week to the work of each Lord Ordinary. Thirdly, the addition of a considerable number of branches of jurisdiction, either altogether new, or largely developed by recent Acts of Parliament, such as the petition business before the junior Lord Ordinary, appeals in bankruptcy, in the registration of voters, in the valuation of lands, etc.

Apart, however, from all comparisons of the amount of business at different periods, no doubt can be entertained as to the fact that the time of all the Judges is at present fully occupied, in some cases much more than fully occupied, and yet the business of the Court is not overtaken. Indeed, the arrears and delays in the despatch of business, which even now are great, call for the immediate interposition of the Court to regulate the calling of cases in the Summary Debate Roll, and will soon, unless some remedy is provided, operate a denial of justice to large numbers of the public.

While we desire, therefore, to reserve all expression of opinion as to the expediency of reducing the number of Judges, if such a proposal should form part of a comprehensive measure for reforming the judicial establishments of the country, and for furnishing other machinery for accomplishing necessary work, we are strongly of opinion that no legitimate economy requires the suppression of a Judge during the existence of the statutes which at present regulate the constitution of the Court, while many causes stand undisposed of, and cannot be overtaken by the present staff of Judges in spite of efforts on their part which are plainly beyond their strength.

In conclusion, we repeat the protest which we made last month, and which, we think, the Faculty of Advocates might becomingly have made at this conjuncture, against the degrading view of the office of Judge and of the legal profession, which lies at the foundation of many of the current theories of legal and administrative reform. That office, if it is to retain the respect of the people, and to continue to be filled by worthy and eminent men, ought not to be shorn of its dignity and attractions, and subjected to the constant attacks of ignorant or envious minds. The interests of the public require that it shall not be made less desirable, in respect of leisure or emolument, than the position of a moderately successful merchant; for in com-

merce the chances of making a large fortune and rising to a high position in the state, are constantly attracting a large number of the ablest and most ambitious men, many of whom would formerly have sought for distinction in the profession of the law. If, then, the rewards of the legal profession are unduly diminished or reduced in value in comparison with those offered by other careers, it is not the present members of the profession who will suffer in the long run so much as the public itself. So far as the legal profession is concerned, we do not believe that unworthy ideas of the judicial office are generally entertained. It is true that certain invidious local privileges have occasioned considerable ill-feeling, and have warped the opinions entertained in some quarters with regard to reform in the administration of the law. But the prejudices and bitterness thus engendered have not materially affected the mass of the profession. Strong and inconsiderate language has indeed been used by the hot-blooded youth, and by those persons of imperfect education, defective sympathies, or disappointed ambition, who are found in every profession, and who sometimes press themselves into undue prominence in public matters. But such men do not express the deliberate opinion of the body they profess to represent. In the legal profession at this moment we have no doubt that the sound general conviction is opposed to any haphazard reduction of our Scottish establishments, either to gratify individual or social pique, or to furnish ambitious M.P.'s with popularity or place. The necessity for reforms of various kinds is acknowledged, and we have been among the foremost in urging it, but Scotland has no need to be ashamed of her judicial institutions, and no desire to vilify her Supreme Court or lower the prestige of her Judges. Notwithstanding the outcry of a few levelling spirits such as we have described, every sensible lawyer of whatever standing must feel that it is a low and short-sighted policy to be ever carping at the Court of Session and the Bar which assists its labours, because he knows that the higher the position of that Court and its Bar, the higher will be the rank which the whole profession holds in the community.

Judicial Addresses.—Among the orations which have lately been in season, the first place is, of course, due to that of the Lord Advocate at the Annual General Meeting of the Scottish Law Amendment Society. It is the first important utterance of a new Lord Advocate, and in that aspect is certainly full of promise. It shows that its author is capable of taking the most enlarged views of Law Amendment, and excites hopes of legislation conceived as wisely and carried through with as firm a hand as the most earnest reformer can desire. Already it has called forth an unusually cordial response from all quarters, and although the Lord Advocate gave no pledge and spoke not in his official capacity, it can hardly be doubted that, if his tenure of office extends over a few years, important changes in the law of Land Rights will be effected. One passage in his address merits the careful consideration of all lawyers, namely, that in which the besetting sin of modern Scotch lawyers is rebuked. We who have urged so many improvements

in these pages, and have seen them so often prevented, retarded, or mutilated by sectional jealousies, know well how much the warning against the malign influence of professional and individual interest was needed, and also, alas! how ineffectual it will prove. The day is distant when Glasgow shall cease to envy Edinburgh and Edinburgh to vex Glasgow. The chief cause for grief is that a noisy gang of agitators is sometimes mistaken for public opinion, nay, that a single active and ill-conditioned person who gets access to the columns of the public prints, may make strangers believe that all the people of Scotland are crying out about grievances which are really nothing but the jealousies of a few local lawyers. We are glad to infer from the Lord Advocate's remarks that he, at least, is aware of the true state of the case, and will endeavour to find out, in regard to all questions of law reform, what is the interest and the wish of the people of Scotland, disregarding the clamour of cliques, whether they be of Glasgow, or Dundee, or Edinburgh. We fancy, too, from what he said on another occasion, that he is prepared to expose, as indeed he has pretty effectually done, the absurd and suicidal war between town and gown in Edinburgh, a war which can only end in loss to both parties. So far as the legal profession in Edinburgh is concerned, we may remark in passing, as we have remarked before, that it would be no loss to most of its members, but probably a considerable gain, if the Supreme Court and all its appurtenances were at once transferred to Glasgow.

It is with much regret that we find ourselves entirely without space to print *in extenso* Mr John M'Laren's admirable address to the Scots Law Society. Although it was impossible on such a subject to say anything absolutely new, we regard it as one of the most important contributions that have yet been made to the discussion of the question, whether and how far the laws of the United Kingdom can be assimilated. Whether or not the line between the possible and the impossible is accurately traced, we have, at least, a distinct sketch of what is within our reach now and what should first be aimed at. In regard to real property law, Mr M'Laren points out that assimilation is both more difficult and less necessary than it is in other departments. We agree that the universal applicability of the *lex rei sitæ* in this case, and the probability that conveyancing, notwithstanding all possible improvements, will remain "a technical art," combine to reduce the possible gain from assimilation to a minimum. But those who have read the address subsequently delivered by the Lord Advocate may, perhaps, doubt whether the difficulty and injustice of assimilating the land laws of England and Scotland, though undoubtedly great, are really insuperable. We grant that the difficulty is not to be overcome in this generation. Mr M'Laren recommends the assimilation of Mercantile and Succession Law by means of special codes. While acknowledging the difficulty of finding skilled men able and willing to undertake the task, and a parliament willing to delegate the duty of making laws, he makes some useful suggestions in regard to these subjects, and concludes with some

general hints as to codification, and a very valuable suggestion as to the abridgments of our reports. He says:—

“As a sequel to the system of partial codification which I have sought to illustrate, I should also contemplate the publication of an authorised abridgment of the existing reports, in which all that was either obsolete or settled by the terms of the code should be omitted. For matters not embraced in the code the reports would still be referred to, but I think they might without detriment to the law be reduced to one-tenth of their present dimensions. This appears to me to be a more feasible proposition than that of digesting the reports in systematic treatises, as recommended by the English Law Commissioners. I do not think a digest in the nature of a legal treatise, with references to cases, would be so well done by the State as it is by private authorship; and the notion of giving the form of law to such a treatise, composed by inexperienced practitioners selected by competitive examination, is, in my humble opinion, altogether extravagant. The same objection does not apply to an authorised selection of the law reports. These reports are at present authoritative. No great harm could arise even if some really useful cases were omitted; their omission would not introduce any new element into the law, it would at most only deprive some rule of its existing support, and leave the point open for discussion.”

We think this has already been done by private enterprise for the decisions of the Supreme Court of the United States in Curtis's Reports.

The introductory lecture of Mr Lorimer, the Professor of Public Law in the University of Edinburgh, dealt with the important subject of Graduation in Law. The failure of the new degree of Bachelor of Laws to attract a creditable number of students, has been the subject of comment, and Professor Lorimer has been seeking for a remedy. He proposes to lower and specialise the requirements of the B.L. degree so far that it may be accepted and required by the professional bodies as a condition of admission, and the restoration of the degree of LL.D. to its proper place, as the highest degree in scientific jurisprudence attainable only by examination. Into the details of the plan and the arguments which support it, we regret that we cannot now enter; but we heartily wish success to this and every effort to raise the status of the profession.

We cannot pass, without a word of approbation, an address by Sheriff Guthrie Smith to the Society of Law Clerks of Dundee. We have before noticed the praiseworthy efforts of this Society after self-improvement, and if Mr Smith's discourse on “The Legal Theory of the State” was a little away from the ordinary practical subjects to which a law clerk applies his mind, so much the better. It is a comfortable thing, in these days of material aims and low conceptions of professional interest and duty, to find a busy magistrate setting himself to teach his procurators' apprentices to become something better than Cicero's “*leguleius quidam cautus et acutus praeco actionum cantor formularum auceps syllabarum.*”

Portraits of Stair and Erskine.—We give the following letter a prominent place:—

SIR,—Scotch lawyers can scarcely be too grateful to the two illustrious writers to whose Institutes it is mainly due that Scotch jurisprudence has maintained an

honourable independence to the present day. May I be excused, therefore, for using the medium of your Journal to contribute some notes and address some queries with reference to the existing portraits of Lord Stair and Erskine? Of Stair there is the well known picture painted by Sir John Medina in miniature, which, with a copy of large size, are at Hailes House. The print of this by John Horsburgh for the Bannatyne Club is common. Lord Stair appears in it in his judicial robes and full-bottomed wig, and if we may trust physiognomy, more-like Forbes's character of him as a "man of great spirit and quiet temper," the "constant bent" of whose thoughts was "to what was serious or profitable," "apt to forget, at least not to resent injuries done to him when it was in his power to requite them," than that which Macaulay (III., 265) has borrowed from the contemporary satirists:—"He had a wonderful power of giving to any proposition which it suited him to maintain a plausible aspect of legality and even of justice, and this power he frequently abused. . . . Shame or conscience generally restrained him from committing any bad action for which his rare ingenuity could not frame a specious defence; and he was seldom in his place at the Council Board when anything outrageously unjust or cruel was to be done." Does any other portrait than Medina's exist? It appears probable that one so noted as statesman as well as lawyer, who lived to a good old age, with many friends, and, despite the misfortunes of his family, numerous descendants, must still live on canvas in more places than one. Any one possessing such a portrait would do a favour to many besides the present writer by letting the fact be known.

Of Erskine there is also a portrait, of which an engraving will be found in the fifth edition of his Institutes (1812), which is there said to have been painted by Medina, but it appears impossible that this can have been the case. Erskine was born in 1695, the year Stair died, and Medina, a Spaniard by extraction, the pupil of Dr Chatel and Rubens, but who had settled in Scotland under the patronage of Lord Leven, died at Edinburgh in 1711. The picture of Erskine is that of a youngish man, but not of a lad of sixteen, his age when Medina died. Can any of your readers inform me by whom this picture was really painted, and what other original portraits of Erskine exist? That in the Parliament House is, I am told, only a copy. It is a pity that that collection, for which the thanks of every lover of art and law is due to the treasurer of the Faculty of Advocates, does not include originals of these great lawyers.

I am, Sir, your obedient servant,

Æ. J. G. MACKAY.

Colonial Appointments.—We observe that the Hon. John Lucie Smith, Attorney-General of British Guiana, was lately appointed Chief Justice of Jamaica (salary £1800) in room of Sir Bryan Edwards, who has retired. The Chief Justiceship of Trinidad, with £1500 a-year, was also vacant a few weeks ago, and presumably Mr Smith's promotion creates a vacancy in the Attorney-Generalship of British Guiana, the salary attached to which is £1100. We do not know, and we are ashamed to say the lamentable deficiency of the Advocates' Library makes it impossible easily to ascertain, whether members of the Scotch bar are qualified to hold any of these offices. If they are not, then measures should at once be taken to have them thrown open to Scotland as well as to the Inns of Court. If they are, then there is special reason now, when accident or carelessness is depriving the Faculty of other colonial preferments which its members have been accustomed to hold, and when misplaced economy is trying to cut down our own "modest and humble" judicial establishments, that the Lord Advocate and the Dean of Faculty should endeavour to obtain some of those prizes

to which Scotland is fairly entitled, but which she will never get without vigilance and strenuous exertion.

Act of Sederunt as to Lord Manor's Roll.—An Act of Sederunt was passed on Dec. 3, "anent causes depending before the late Lord Manor." It proceeds on the preamble "that by the death of the late Lord Manor, on the 7th day of October last, the office of Junior Lord Ordinary became vacant, and that Her Majesty has not been pleased as yet to appoint any person to fill the vacant office, and that many litigants whose causes depended before Lord Manor at the time of his death, have been exposed to great hardship and inconvenience by the delay which has been occasioned in the progress of their causes by reason of the continued vacancy." It provides that all causes depending before Lord Manor, except the petitions transferred to Lord Mure by Act of Sederunt of October 15, and Bill Chamber proceedings, shall be remitted to one or other of the remaining Lords Ordinary, in the option of the pursuer in ordinary actions, and of the respondent in suspensions. Such opinion is to be declared by enrolment and obtaining an order for further procedure before any Lord Ordinary within a fortnight from the date of the Act of Sederunt (December 3). Failing such enrolment, any party in the cause may enrol to the same effect before any Lord Ordinary. The Outer House clerk attached to the late Lord Manor is directed to transfer the process to the office of the Lord Ordinary before whom any cause has been so enrolled, on production of a certificate of that fact by the agent of the party enrolling.

Obituary.—JAMES HOWIE, Esq., Writer, died at Glasgow, Nov. 17.

THOMAS SYME, Esq., W.S., (1820) (Davidson & Syme) Treasurer of the Bank of Scotland, died at Edinburgh, Nov. 28.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie, and William Mackintosh, Esquires, Advocates.)

FIRST DIVISION.

CALEDONIAN RY. CO. v. EDMOND.—Nov. 16.

Lands Clauses Act—Compensation—Interest—Consignation.—Reduction of a decree in a valuation trial which was held before the Sheriff of Aberdeen (Jamieson) and a jury on 9th Jan., 1868, to assess the amount of compensation for certain land proposed to be acquired by the ry. co. The jury unanimously gave a verdict for £4703 15s, and the Sheriff decreed for that sum, with interest at 5 per cent. from 8th Nov., 1864. The Ry. Co. pleaded that it was *ultra vires* of the Sheriff to award interest. Defr. maintained that the ry. co. had acquiesced in the Sheriff's finding of interest, and that they had made consignation of the amount awarded by the jury with the interest, and were, therefore, now barred from objecting. The ry. co. replied that the consignation was made under error, and that under the Lands Clauses Act of 1845, they were not directed to consign but to pay the money.

The L. O. repelled the defences. Defr. reclaimed. The Court held that the Sheriff had gone beyond his power in awarding interest, but that the fact of consignation was a serious obstacle in the way of the reduction concluded for, and, accordingly, they allowed pursuers a proof of their averments relative to that matter, and defr. a conjunct probation. They also allowed pursuers to make some additional statements with reference to an understanding alleged by them that defr. was to relieve the company of certain

ground annuals, and allowed a proof of these when made, so that the whole circumstances preceding the consignment might be before the Court.

Act.—*Advocatus, Johnston.* *Agents*—*Hope & Mackay, W.S.*—*Alt.*—*Sol.*—*Gen., Clark, Watson.* *Agents*—*M'Ewen & Carment, W.S.*

WILCOX & GIBB'S SEWING-MACHINE CO. v. STIRLING.—*Nov. 19.*

Expenses—*Precognition.*—In this case the Court decided several points as to the expenses of a jury trial that took place in July. They allowed £1 1s a-day for thirty-five days to a witness from Virginia, in addition to £6 6s for expenses between Virginia and New York, and £52 as passage money, including maintenance, between New York and this country. They allowed the charge for the drawing of a precognition of a scientific witness, and also the witness's charge for drawing his report. They also allowed the charge for the precognition of one of the principal witnesses, who, though not a party to the action on the record, was in fact the party upon whose information the case mainly depended, and who had the principal interest in the case. They held that the successful party was entitled to charge for three counsel, though the other side had only employed two.

SCOBIE AND OTHERS v. CHRISTIE.—*Nov. 20.*

Bankruptcy—*Sequestration*—*Notice to Creditors not claiming, but included in State of Affairs.*—Appeal from Sheriff of Perth, in a petition by John Scobie and others. Petrs. were creditors on the sequestrated estate of James Hill, who was sequestrated on Sept. 9, 1868. Christie was trustee. The bankrupt failed to lodge a state of affairs at the first meeting of creditors, and therefore the trustee gave the statutory notice only to the creditors who had then claimed on the estate. None of the petitioners at that time claimed, and so got no notice of the future proceedings contemplated. At the first diet for the bankrupt's examination, no state of affairs was forthcoming; and on the trustee's motion an adjournment was obtained, and then a state was lodged and sworn to by the bankrupt. In this state nineteen creditors were set down. Petrs. were among them, and subsequently lodged claims; but being beyond the time under the statute for participating in the first dividend (which in this case exhausted the estate), the trustee did not adjudicate upon their claims, but prepared a scheme by which the whole estate was to be divided among the fourteen creditors who had claimed within the statutory period. Petrs. prayed that the trustee should be interdicted from making any payment to creditors to their prejudice, and ordained to adjudicate upon their claims. The S.S. (Barclay) granted the interdict. The Sheriff recalled, and sisted, to await the result of an appeal presented by another creditor to the Court of Session against the resolution of the commissioners of the estate, resolving to divide among the whole creditors, not excluding the petrs.

Petrs. appealed, and the other appeal referred to by the Sheriff was remitted to it *ob contingentiam*.

In the case of Scobie, *Held* that there could be no doubt that both the bankrupt and the trustee had failed to do what was required under the statute. The bankrupt was bound to lodge a state of his affairs, and if he did not, it was the duty of the trustee to compel him. The statute required that the trustee should send notice not only to the creditors who had lodged claims, but also to those included in the bankrupt's state of affairs. He had only performed one part of his duty, and as all the creditors were entitled to notice under the statute, they had a right to come forward now, and

insist that the dividend should not be paid without their participating in it. The Court therefore affirmed the judgment of the S. S.

In the appeal of the creditor, the Court continued the case until the trustee should formally become a party, in order that they might get explanations from him.

A. v. B.—Nov. 20.

Interest—Accumulations—Settlement—Special Case.—A testator directed that the residue should be “invested in heritable security, railway debentures, the public funds, or other good securities,” and that the interest of the said residue should be “annually accumulated and invested in the same manner as the residue itself.” The executor kept the capital in his own hands, under an obligation binding himself, his heirs and executors, to pay it to the beneficiaries, his own younger children, in terms of the will, and in the proportions and at the periods therein mentioned; and he half-yearly, till his death, paid into a separate bank account interest at 4 per cent. upon it. These payments of interest were annually accumulated at bank interest. The judicial factor on the executry estate claimed interest against the executor’s trustees at 5 per cent., both on the capital sum and on the payments of interest. *Held*, that the executor’s relationship to the beneficiaries, his large fortune, and the entire good faith with which he acted, were special circumstances which rendered interest on the capital at 4 per cent. sufficient; and, as regards interest on the payments of interest, that the directions of the will could not be held to mean that the interest was to be invested annually; and that, therefore, the executor had done all that could be expected of him in lodging it in the bank and allowing it to accumulate there.

Act.—Watson, Darling. Agents—Russel & Nicolson, C.S.—Alt.—Horn, Muirhead. Agent—J. S. Darling, W.S.

PAROCHIAL BOARD OF ABERDOUR v. KIRK-SESSION.—Nov. 24.

Poor—Heritors and Kirk-Session.—The Parochial Board of Aberdour sought to establish their right under the Poor-Law Act 1845, sec. 57, to two sums of £323 12s and £45, held by the kirk-session for behoof of the poor. The larger sum was the amount of a bond by the Earl of Moray, dated 2d June, 1800; and the smaller the amount of an acknowledgment or obligation by his factor, as acting for him, dated 24th May, 1825. The bond as well as the acknowledgment expressly bore that the sums for which they were respectfully granted belonged to the kirk-session of Aberdour for the use of the poor of the parish, and that Lord Moray obliged himself to repay the same to the minister of the parish for himself and the other members of the kirk-session “for the use of the poor of the said parish.” The smaller sum had been bequeathed in 1825 by Mr Douglas Morrison, payable to the minister and kirk-session “towards relief of the poor of the parish.” But there was doubt as to the sources from which the larger sum was derived. There would appear to have been at an early period a box into which were put and kept the funds at the disposal of the kirk-session for behoof of the poor. The funds generally would appear to have come from various sources—voluntary contributions of heritors, collections at church-doors, sums paid for mortcloth and marriages, sessional penalties, and for the privilege of erecting head-stones in the churchyard. The larger sum was the price paid by Lord Moray for certain houses and small pieces of ground purchased with the funds derived from these various sources by the kirk-session in 1735, and sold to him about 1800.

The L. O. (Ormidale) found that the Parochial Board were entitled to both these sums.

Against this decision the kirk-session reclaimed.

Lord Deas—I think that the substance of the provision of the Act is that all funds held by the minister and kirk-session for themselves and the heritors jointly for behoof of the poor must be transferred to the Parochial Board. And the question thus comes to be whether those funds have been held and administered by the kirk-session for behoof of themselves and the heritors jointly. With regard to the larger fund, I am compelled to come to the conclusion that this fund had been administered jointly for the benefit of the heritors and kirk-session. If it could be shown that the fund had been administered exclusively by the minister and kirk-session since 1735 for the benefit of the poor, I would have come to the conclusion that it ought not to be transferred to the Parochial Board. It appears clear from the minutes of the heritors and of the kirk-session that the whole of the funds for the relief of the poor, including the interest of the sum now in dispute—at least from the year 1717 downwards—were distributed by the minister and kirk-session, under directions of the heritors, both for relief of the occasional and legal poor. Though all expediency would point to leaving the fund in the hands of the kirk-session, I do not see that there is any discretion left to the Court. A great deal of what I have said applies to the smaller fund, and I have not been able to make any distinction between them.

Lords Ardmillan and Kinloch concurred.

The Lord President—I agree with all your Lordships' so far as regards the sum of £45. I think that we must hold it to be settled that in such a question the "poor" means those who have a right to relief. Such a bequest is very foolish, for it merely relieves the ratepayers. The other fund stands in a different position, and I have difficulty in coming to the same conclusion as your Lordships. The original investment of this fund was in the purchase of land, and the disposition is taken in the names of the minister and kirk-session for behoof of the poor and indigent of the parish. This was the act of the kirk-session alone, without any consultation or concurrence of the heritors, and it appears to me to be certain that the funds with which the purchase was made were derived from sources which entitled the kirk-session to devote them to the relief of the occasional poor. The fund was a mixed one, and the heritors were content to leave the administration in the hands of the minister and kirk-session. As regards, indeed, this particular investment, there is evidence to show that the kirk-session were dealing with the fund as if it belonged to themselves, and as if they were entitled to deal with it as their own. But, at all events, I cannot resist the conviction that to some extent at least the funds which were in the hands of the kirk-session when they made the investment were funds they were entitled to use otherwise than for relief of the legal poor. If there were any way in which we could apportion the fund, so as to give the heritors the amount they are entitled to, and the kirk-session their share, I would be very glad to do so. But the Parochial Board are *in petitorio*, and are bound to prove their right; and on the ground that they have failed to do so I would not be disposed to give effect to their claims. I have said so much to prevent its being supposed that I think that a fund which is partly administered for behoof of the legal and partly for the occasional poor should necessarily go to the Parochial Board.

The Court adhered.

Act.—Gifford, Watson. *Agents*—Wotherspoon & Mack, S.S.C.—*Alt.*—Shand, Asher. *Agents*—Adamson & Gulland, W.S.

ADVN.—GOULD v. M'CORQUODALE AND OTHERS.—Nov. 24.

Servitude.—Advocation from the Dean of Guild Court of Glasgow. M'Corquodale & Co. were proprietors of a piece of ground lying to the north of Fox Street, formerly belonging to James Oswald, under a title which declared that "no building shall be erected within fifty feet of the north of the said street or lane called Fox Street, higher than 32 feet in the said walls." Thomas Gould, the advocator, is proprietor of subjects on the opposite side of Fox Street, and had a corresponding clause in his titles. The advocator now objected to the buildings which respt. proposed to erect and maintained, that these would be in violation of the titles of both parties, and injurious to his property. The Dean of Guild held that the advocator had no right to object; but the Court held that there was a servitude *allius non tollendi* in the titles of the parties, and that the advocator was not now barred from objecting to buildings directly opposite his own, although he had allowed other parties who were under the same restrictions as respta. to erect buildings on another part of the street.

Act.—Sol.-Gen., Balfour. *Agents*—Ronald & Ritchie, S.S.C.—*Alt.*—Shand, Asher. *Agents*—J. W. & J. Mackenzie, W.S.

FORREST & BARR v. HENDERSON, COULBORN & Co.—Nov. 26.

Penalty—Modified Damages.—Bill of exceptions to a ruling of Lord Neaves in a jury trial which took place at Glasgow in October last. In the course of his charge the presiding Judge left it to the jury to say whether £20 a day, mentioned in letters passing between the parties of 13th Jan., 1864, as the penalty in the event of delay in delivering a Derrick crane agreed to be furnished by pursuers to defrs., was, in the circumstances, an exorbitant and unconscionable amount, as payable for the delay referred to, and asked the jury in that event to find what was the utmost amount of actual damage that may have been incurred. *Held*, that the Judge was justified in leaving it to the jury to decide whether the penalty should be enforced in its terms or be modified. As the case was one which required special mechanical knowledge, it was proper for the jury to say whether or not the damages stipulated were in the circumstances exorbitant and unconscionable.

Act.—Sol.-Gen., Deas. *Agents*—Duncan, Dewar, & Black, W.S.—*Alt.*—Decanus, Asher. *Agents*—J. W. & J. Mackenzie, W.S.

TURNER AND OTHERS v. COUPER AND OTHERS.—Nov. 27.

Intestate succession—Collation—Special Case.—Miss Agnes Hamilton died unmarried, and predeceased by her three sisters, Mrs Eadie, Mrs Couper, and Mrs M'Donald, who each left issue; and as her trust-disposition was invalid, her succession fell to be dealt with as if she had died intestate. Mrs Turner, only child of Mrs Eadie; Robert Couper, eldest son of Mrs Couper; and Thomas M'Donald, eldest son of Mrs M'Donald, each took a third of the heritage. Mrs Turner claimed, in addition, one-third of the moveable estate, or else to have a share allotted to her along with the younger children of Mrs Couper and Mrs M'Donald; or else that the whole moveable estate should be divided equally amongst Miss Hamilton's thirteen nephews and nieces. The opposing claimants, however, denied her claim to any

part of the moveable succession, unless she collated her share of the heritage. *Held*, that the succession fell to be dealt with as at common law. The Intestate Succession Act gave representation to children only where their parent would have been one of the next of kin if she survived the intestate, and if others of the next of kin had survived the intestate. But here all the sisters predeceased the intestate, and therefore the thirteen nephews and nieces were themselves the next of kin. The moveable estate of Miss Hamilton must, therefore, be divided amongst them by common law; and common law always required that a person taking heritage could not take a share of the moveable estate unless he also collated. Mrs Turner, therefore, as taking a share of the heritage and refusing to collate, must be held barred from a share of the moveable estate, which, therefore, was to be equally divided amongst the younger children of Mrs Couper and Mrs Hamilton.

Act.—*Fraser, Scott.* *Agent*—*John Walls, S.S.C.*—*Alt.*—*Sol.-Gen.* *Agent*—*James Webster, S.S.C.*

CAMPBELL v. MACPHERSON GRANT.—Dec. 1.

Heritable and Moveable—Judicial Factor.—Multiplepointing and exoneration raised by Campbell Macpherson Campbell, judicial factor on the trust estate of Miss Anna Carnegie, who died in 1799. In 1865 pursuer was appointed judicial factor, and paid over the proceeds of the estate to Miss Helen Hay Carnegie till her death in Nov., 1866. On that event, Thomas Macpherson Grant became entitled to the whole trust estate under the settlement of Thomas Carnegie, heir of Miss Anna Carnegie. Thomas Carnegie left his whole estate, heritable and moveable, to Thomas Macpherson Grant and the heirs whomsoever of his body, whom failing, to his own heirs whomsoever. T. M. Grant having, from mental disorder, become incapable of managing his affairs, the conveyance fell to be made to his curator bonis. Pursuer, before handing over the estate to the curator, proceeded to realise a bond for £4000 over the estate of Balwyllo and Balnillo. The Misses Carnegie, who claimed the fee of the estate on the death of T. M. Grant, as heirs whomsoever of their brother Thomas Carnegie, maintained that the judicial factor ought to have kept the funds of the trust-estate invested in heritable security, and that the curator of Mr Grant was not entitled to payment of the sum contained in the bond, but only to a conveyance of the bond itself, in terms of the destination in Thomas Carnegie's settlement.

The L. O. (Jerviswoode) found that the whole estate of Miss Anna Carnegie must, in the matter of succession, be dealt with as heritable estate; 2d, that any act of the judicial factor in uplifting and discharging heritable securities could not operate to alter the order of succession. The Court recalled this judgment, and found that the sale of the bond and disposition was not authorised by the Court, and was beyond the power of the judicial factor, and superseded consideration of the case in order to give the judicial factor an opportunity of reacquiring the bond and disposition.

Act.—*Sol.-Gen., Clark, Mackay.* *Agent*—*A. Howe, W.S.*—*Alt.*—*Gifford, Watson, Asher, Advocatus.* *Agents*—*Grant & Innes, John B. Innes, W.S.*

SCOTT v. RITCHIE.—Dec. 1.

Lease—Payment for Turnips by Incoming Tenant.—John Scott, sometime tenant of Whippielaw, sued Ritchie, who succeeded him as tenant of the farm, for £32 2s, the value of 47 tons 14 cwt. and 2 qrs. of turnips. The lease contained the following clause:—"During the last year of this lease,

a portion of the land hereby let, not less than ten imperial acres, shall be under turnips, to be properly dunged, wrought, and dressed, and for which turnips the tenant shall be paid by the proprietor or incoming tenant as the same shall be valued by two men, one to be appointed by each party." The arbiters appointed by the parties differed, and appointed an oversman, who gave his opinion that the turnips were worth 16s per ton if carried off the farm, and 10s 8d per ton if restricted to be consumed on the farm; and that, in terms of the lease, the incoming tenant was bound to pay the market value of the turnips as if they were carried off the farm—viz., 16s per ton. The L. O. (Jerviswoode) found that the sum payable was to be calculated at 10s 8d per ton, but the Court decreed for the whole sum claimed by pursuer, being at the rate of 16s per ton.

Act.—Hall. Agents—Neilson & Cowan, W.S.—Alt.—Lee. Agents—Macrae & Flett, W.S.

SMITH v. SMITH.—Dec. 4.

Loan—Proof.—David Smith, as administrator-at-law for John Smith, sued John Smith, Auchensfauld, for £280 and £50, advanced in loan by the deceased John Smith to defr. Pursuer rested his claim for the first sum on an acknowledgment:—"Auchensfauld, July 1, 1864.—I, John Smith, Auchensfauld, acknowledge that I owe to John Smith, Tyntwell, Lanarmon, Denbyshire, the sum of £280 sterling. (Signed) John Smith." Defr. denied that this document was in his handwriting. It was attempted to set up this document by acknowledgments in letters between the parties and their agents. The L. O. (Jerviswoode) decreed for both sums. The Court reversed with regard to the £280; defr. admitting the debt of £50. *Held* that, to set up such a debt, there must be a document which the law allows. It would be very perilous to admit the letters of the agents as evidence of loan. They might, perhaps, in other circumstances, be admitted to set up a document. But they were not the statement of the party on oath, nor had the Court even the oath of agent to the fact of the statement having been made by the party. As the foundation of a case, these letters were altogether worthless. The whole admissible evidence was a letter by defr. on 13th Feb., 1868. But that did not acknowledge that defr. had received a loan, but stated that the money was given for behoof of himself and for others. The Court could not take the admission of the receipt of this money without the qualification contained in it.

Act.—Mackenzie, Blair. Agent—James Latta, S.S.C.—Alt.—Pattison, Watson. Agent—James Somerville, S.S.C.

MILNE v. KIDD.—Dec. 8.

Railway—Forfeited Shares—Guarantee—Cautioner.—This was one of a number of cases which arose out of a guarantee, granted by persons in Peterhead, to induce the Formartine and Buchan Railway Company to continue their railway to Peterhead. On 19th Nov., 1861, five gentlemen, of whom defr. was one, wrote a letter to the directors of the railway, undertaking to procure subscriptions to the amount of £20,000 on condition that the railway to Peterhead was at once proceeded with. In fulfilment of this engagement, defr. subscribed a letter of guarantee whereby, in the event of pursuer obtaining an allotment of fifty shares, defr. bound himself to guarantee him against loss in the event of their not being disposed of at par, with interest at 5 per cent. on the advances made. Other parties undertook similar obligations to the extent of £20,000. This obligation was to

be implemented upon the expiration of three years after the opening for public traffic of the extension line between Mintlaw and Peterhead. The line was completed and opened for traffic on 3d July, 1862, and the implementation of the guarantee thus became exigible on 3d July, 1865. Deft., however, refused to implement it, and maintained that material alterations had taken place in the character and liabilities of the railway company since the letter was granted; that the value of the shares had been deteriorated by the creation, under an Act of Parliament in 1863, of preference stock and debentures, and that the construction of the letter of guarantee, being of the nature of a cautionary obligation, was *strictissimi juris*.

The L. O. (Barcaple), after proof, found that pursuer, acting on the faith of the letter of guarantee, obtained from the directors of the railway company an allotment of fifty shares, and paid, or procured to be paid the calls thereon, amounting to £500; that the dividends which had accrued on these shares had been less in amount than interest at 5 per cent. on the calls; that the shares had not at any time been saleable at par; and that deft. was now bound to pay the pursuer the amount of the calls, with interest at 5 per cent., from the dates of payment, under deduction of the dividends paid, and on the pursuer transferring the shares to the defender.

Defender reclaimed, and contended that stock had never been truly allocated to pursuer, and that no money had ever been paid by him, and that the stock now offered was not the stock contemplated in the letter of guarantee, but forfeited stock, to which the pursuer had no proper title.

Lord President—There cannot be much doubt that pursuer is entitled to prevail substantially. The Formartine and Buchan Railway Company was incorporated in 1858, and by 1860 had constructed the line as far as Old Deer; but they were then met with the difficulties arising from failure upon the part of those who had subscribed for shares to pay the calls upon these shares, and the company were not in a condition to carry forward their line to Peterhead. This was considered by the people interested in the town of Peterhead as a great calamity. In 1860 a number of gentlemen came forward to assist the company by endeavouring to obtain money for them. Five gentlemen, of whom deft. was one, came under an obligation, on condition of the directors of the railway company immediately proceeding with the construction of the line to Peterhead, to procure subscriptions and guarantees—so their letter of obligation is expressed—"to procure subscriptions and guarantees, on shares in the line, including the subscriptions in the annexed list for 378 shares, to the amount of £20,000." That was a mutual agreement between these five gentlemen and the railway company that, if the railway company would make their line to Peterhead, they would procure in this way an additional capital for them of £20,000. The letter of guarantee, as it is called, upon which this action is laid, was signed by a great number of individuals connected with Peterhead, and among others by deft., Mr Kidd. Now, the substance of the letter is this—the parties subscribing it undertake, upon pursuer obtaining an allotment of shares to the extent set opposite the name of each subscriber, to become bound to the extent of these shares to guarantee Milne against any loss he might sustain if he should not be able to dispose of the shares at par, with interest upon the amount of that loss at 5 per cent., and this they became bound to do within three years after the opening for public traffic of the portion of the line which was to connect Old Deer and Peterhead. But it was expressly conditioned that they were not to be bound by this guarantee at all, until the portion of the

line referred to was opened for public traffic and had been open for three years. Then there are some provisions as to the ultimate disposal of the shares. The parties subscribing as guarantors are to be entitled to take over the shares at any time by relieving Mr Milne of his advances; and, on the other hand, Mr Milne is bound to offer them these shares before disposing of them in the market. By entering into this arrangement, not becoming shareholders of the company, but merely undertaking the liabilities of shareholders in a certain event, and upon certain conditions, they obtained as the return for that obligation a security that the particular part of the line in which they were interested should be completed and opened for traffic. The first observation that occurs is that the guarantee does not partake in any degree of the nature of a cautionary obligation. The guarantee is really one of the reciprocal stipulations of a mutual agreement, and nothing else, and the party who undertakes a guarantee in such an agreement is not entitled to any of the equities of a cautioner. His guarantee is binding absolutely upon him, if the conditions upon which it is granted are fulfilled to the full extent to which any other of the counter stipulations of a mutual agreement are binding. It is said that Mr Milne is not entitled to enforce the agreement because he has not fulfilled one of the conditions, viz., to obtain an allotment of a certain number of the ordinary shares of the company. It is said that the shares which stand in his name, and which he now tenders to defr., are not shares allotted to him in any sense of the term, but shares which had been allotted to another party, which had thereafter been forfeited in terms of the clauses of the Companies' Clauses Act, and, after they had been forfeited, were transferred by the company to Milne. Now, under the circumstances, it is impossible to understand the term allotment in its restricted and proper sense. The whole shares of the railway company had been already allotted. The railway company was incorporated in the year 1858, and it was in the end of 1860, or the beginning of 1861, that this arrangement was made. The allotment of shares properly speaking occurs before the company is incorporated; but even supposing that allotment of shares in the proper sense may go on after the Act of Incorporation has passed, still it must have been perfectly well known to the parties who conducted this arrangement, and, above all, to Kidd, who obviously had a very intimate knowledge of all these affairs, that the shares of the railway were all taken up; and the difficulty did not arise from finding allottees to whom to give out the original shares, but the difficulty arose from this, that those who had originally taken the shares as allottees were unable to pay up their calls, and that to the extent of a very large proportion of the stock, amounting to nearly one-half of the whole. It is quite impossible that Kidd could have expected that what was to be done by Milne was to obtain an allotment of shares in any proper sense of the term. Mr Milne procured certain forfeited shares to be transferred into his own name, and himself to be registered as shareholder in respect of these shares. It is said that there was an irregularity in the way in which the forfeiture was carried out. The irregularity, if there was one, is an exceedingly shadowy one, and that any interest that remained or could possibly be supposed to exist in the original holder of the shares, whose right was forfeited, is not of a kind that can ever be brought into question so as to disturb the existing owners of these shares. But even if there was any irregularity in this, it is of very little consequence in the

present question. The line has been made, and is open for traffic, and has been so for more than three years before this action was raised. Milne has never been able to dispose of the shares at par; he has lost £500 upon the shares for which Kidd is responsible, and he seeks to recover £500, with interest at 5 per cent., under deduction of any dividends paid upon these shares in the meantime. That seems to be a demand justified by this agreement. Of course, on payment of that sum, Milne must transfer these shares to Kidd, and give him a good title. When the case was originally argued, there was difficulty in seeing what kind of title Milne was in a condition to give. We ordered pursuer to state precisely the nature of the title. A minute was accordingly lodged. While pursuer insists that the title which he is in a condition to transfer, is unexceptionable, especially when accompanied by a renunciation of all interest in the shares by the party in whose name they originally stood—which is also offered—there is an alternative offer: that if defr. is not satisfied to take these forfeited shares, pursuer is willing to transfer to him an equal amount of stock of the same denomination, never been forfeited, and, free from objection. I hold that to be an alternative tender still standing for the defender's acceptance, and it will be for the defender to say which of these modes he prefers. I think he is bound to take one of them, and upon his electing to take either the one or the other, and obtaining a proper title accordingly, we ought to pronounce judgment in terms of the conclusions of the summons. With regard to the plea on the Act of 1863, by which it is said that the character and value of the shares in question was materially altered, there is no doubt that, by the creation of preference stock under the Act of 1863, the original shares no longer stand in the same position. They are postponed to other shares, and also to debentures; but I am afraid that all ordinary shares of railway companies are subject to these occurrences. It is by no means uncommon that, after a railway company has gone on for a certain time with nothing but ordinary shares, it finds it necessary to create preference shares. It may be called a natural incident of the ordinary stock of a railway company that it should be treated in this way. No doubt if we were here dealing with a proper cautionary obligation undertaken by defr., there might be a great deal more room for the defence founded. There is no ground whatever to say that defr. here, or those who combined with him in entering into this agreement, are entitled to any of the equities of a cautioner.

*Act.—Sol.-Gen., Clark, J. Maclaren. Agents—Henry & Shires, S.S.C.—
Alt.—Millar, Watson. Agents—J. B. Douglas & Smith, W.S.*

SECOND DIVISION.

SANDS v. AULD.—Nov. 12.

Filiation and Aliment—Proof.—Appeal from the Sheriff of Stirlingshire in an action of filiation and aliment. Defr. was an apprentice and pursuer a domestic servant with M'Callum. The child was born on Feb. 6, 1867, and pursuer had quitted M'Callum's service on May 27, 1866, so that the conception of the child must have taken place shortly before the May term, 1866. The only corroboration of pursuer's oath was proof of "tousling" on one occasion in spring or summer 1865, the witness being M'Callum; and the conduct of defr. after he was charged with the paternity of the

child shortly before its birth. The S. S. (Sconce) decerned in favour of pursuer; but the Sheriff (Blackburn) reversed. The Court returned to the S. S.'s judgment, *L. Benholme diss.* The majority founded strongly on the fact that, when defr. was charged with being the father of the child, he had denied being the father, but had never expressly denied having connection with pursuer, while on several occasions he had used words which, while negating the paternity, seemed to do so merely on the ground that the time of birth did not correspond with that of intercourse which might be proved against him; that, if the woman's charge against him were not true, it was not a proper answer to such a charge, to travel some miles to see pursuer (as he had done). An innocent man would have at once repudiated the charge as concocted. *Observed* that, in the Sheriff Court, it was an infringement of the statute to adjourn diets of proof, as had been done here, without stating in the interlocutor the special reason of such adjournment; and there had been too many instances of such delays having been taken advantage of for the purpose of procuring fresh evidence. Further, it was reprehensible to take down the evidence of pursuer, the leading witness, merely as concurring, in regard to the incident in spring 1865, with Mr McCallum, who had previously deponed. The precise statement sworn to ought to have been taken down.

Ad.—Guthrie. Agent—N. M. Campbell, S.S.C.—Alt.—Burnet. Agent—Henry Buchan, S.S.C.

LOC. OF CALLANDER—EARL OF MORAY v. THE MINISTER.—Nov. 16.

Teinds—Crown lands.—Question whether the lands forming the royal forest of Glenfinlas, of which the Earls of Moray are hereditary keepers, under charters dated in 1528 and 1531, is a teindable subject, and liable for stipend. The Earl of Moray maintained the negative, upon two grounds—(1) That the forest in question belonged in property to, and had never been alienated by the Crown; (2) That it had always been dealt with as teind free, and had thus prescribed an immunity from stipend.

The L. O. (Mure), repelled the contention of the Earl in both its branches, holding—(1) That it appeared that prior to the charters in favour of the Moray family, the Forest of Glenfinlas had been granted in property to other subjects, and had been reacquired by the Crown on the forfeiture of the Duke of Albany in the year 1425; (2) That the evidence failed to show that the forest had always been dealt with as teind free.

The Earl reclaimed; but the Court adhered—Lord Neaves observing that, notwithstanding *Gilchrist v. E. of Haddington*, Nov. 24, 1829, 5 F. C. 108, he was not prepared to hold it law that Crown property, even if never alienated, was necessarily teined free.

Ad.—Sol.-Gen., Shand. Agents—Melville & Lindesay, W.S.—Alt.—Webster, Balfour. Agents—Marshall & Stewart, S.S.C.

SIR A. BUCHANAN v. COUBROUGH AND OTHERS, *et c. contra.*—Nov. 17.

Stream—Right to Divert.—Pursuer is proprietor of the lands of Dumbrock in Stirlingshire, and through his property there flow two streams, called respectively the Milndavie Burn and the Blane, which join at a certain point within his lands, and thereafter at a point much lower down, the united stream is in part taken off by an intake and lade into defrs.' print-work of Blanefield, which works have been in continual operation since 1794. Defra. acquired right to this water at that date by express grant, coupled

with the right to execute all operations necessary at and above their intake, to direct a due flow of water into that intake. The present litigation began by an attempt on the part of pursuer to cut off the Water of Blane above defrs' intake, and restore it at a point below that intake. Hence the first action brought by defrs. in the form of a suspension and interdict. Some time later, defrs. strengthened the banks of the Blane above the intake, as they were empowered to do under their title-deeds. These operations led to a second suspension and interdict, at pursuer's instance, to prohibit the execution of such operations. While these operations were proceeding, pursuer brought a declarator to have it declared that he was entitled to use the water of both streams for printing and bleaching, and "for all other manufacturing purposes," or at least to regulate and control that water as he had been in use to do in and prior to 1807; that he was entitled to take off the Blane, and restore it within his own lands in such a way as to make it available for his lowest work at the same level, and with the same fall as existed in and prior to 1807, as also, to restore that water at a point below defrs' intake; and that defrs. had no right to make any embankments on the Blane or its *alveus*, to the effect of altering the level of the *alveus*, or gorging back the water upon pursuer's works.

The points in fact and law chiefly maintained for pursuer were (1) that he had not now the same fall for the wheel at his lowest mill as he once had, and that this was owing to defrs. having altered and raised the weir at their intake, and therefore that they should be ordained to lower the level of their weir; and (2) that in respect pursuer had made certain embankments upon lochs or reservoirs, some of which were on his own lands and others on the lands of neighbouring proprietors, and of which the overflow passed into the Milndavie Burn, a natural stream, he was therefore entitled to divert that water from flowing into the Blane, and to regulate and control its flow as he pleased.

The L. O. (Ormidale) conjoined the actions; and after a lengthened proof on both sides, declared the interdict at the defrs. instance perpetual, refused the interdict at pursuer's instance, and, as to the action of declarator, found that he had failed to prove any of the averments on which it was based, and therefore assoilzied defrs. from the whole conclusions of the summons.

The Court adhered, holding that there was no proof the weir had been raised, and that pursuer was not entitled to divert or control the water of lochs in the manner claimed.

Act.—*Sol.-Gen.*, Balfour. *Agents*—Ronald & Ritchie, S.S.C.—*Alt.*—*Advocatus*, Brand. *Agent*—W. Mitchell, S.S.C.

MITCHELLS v. STRACHAN AND OTHERS.—*Nov.* 18.

Multiplepoinding—Arrestment.—Advocation from the Sheriff of Aberdeenshire of a multiplepoinding, pursuers and real raisers being fish-curers. Strachan had previously obtained decree against them for £23 15s 3d, as the price of herring supplied in pursuance of contract, and for £20 16s 5d, as expenses of process. These two sums formed the fund *in medio*. Objections to the competency of the MP. were lodged by several of the defrs. The S. S. and Sheriff sustained the objections; and on the cause being advocated, the L. O. (Jerviswoode) repelled the reasons of advocation. The raisers reclaimed, and urged that, while Andrew Strachan held decree for the sums now brought into Court, one James Duthie, an alleged creditor of

Strachan, had used arrestments in their hands, and had taken no further steps in prosecuting his claim against Strachan. They contended that a MP. was the only means by which they could legitimately relieve themselves of the fund.

The Court adhered. There was no authority for holding a single arrestment to be sufficient ground for a multiplepointing. Here there was in fact only a single claim, and the process of multiplepointing was not intended for such cases. If the holders of the fund were charged, the remedy of suspension was open to them.

Act.—Mackenzie, Robertson. *Agent*—C. S. Taylor, S.S.C.—*Alt.*—Pattison, Harper. *Agents*—Morton, Whitehead, & Greig, W.S.

NICOL v. J. & J. ALLAN.—Nov. 18.

Sale—Expenses.—Appeal from the Sheriff of Linlithgow in an action for £40 12s, being the price of two stacks of barley-straw sold by pursuer to defra. at the rate of £2 18s per ton. Defra. admitted the sale, but stated that they had endorsed the delivery order to Marshall & Co., of the Bo'ness Pottery, and that, on being weighed by them, it was found to be only 9 tons 8 cwt., which, at the price agreed on, did not amount to the sum claimed. After a proof the S. S. decerned against defra. for the sum of £57 11s, but found pursuer entitled to £3 of expenses. Both parties appealed, and the Sheriff (Monro) recalled the interlocutor so far as it found pursuer entitled to any expenses, and found expenses due to neither of the parties. See above vol. xiii., p. 581. Both parties appealed; but the Court adhered.

Act.—Gloag. *Agents*—Wilson, Burn, & Gloag, W.S.—*Alt.*—Gifford. *Agents*—G. & H. Cairns, W.S.

ANDERSONS v. ANDERSON.—Nov. 23.

Joint Ownerships—Partnership—Remuneration for Services.—Accounting as to defra's management of a farm formerly tenanted by the deceased father of the parties, and which, it had been previously held, was to be dealt with as a joint concern. The L. O. (Barcaple) had repelled a claim by defra. to an allowance for management, holding that the case being one of partnership, no partner could, in the absence of express stipulation, claim remuneration for services rendered to the copartners. *Held* that the relation here was not properly partnership, but joint-ownership, and that remuneration to some extent must be allowed. The amount allowed, however, must be limited to £5 a-year for the period over which the management extended.

BAYNE v. RUSSELL'S TRS. AND OTHERS.—Nov. 23.

Obligation of Relief—Propositura.—Action of relief by William Bayne, one of the trustees of the late Robert Russell. Pursuer had in 1865 signed a cash-credit bond to the National Bank, for £600 along with his two co-trustees, and the proceeds were applied to the purposes of the trust. On the death of one of his co-trustees in 1866, he desired to be relieved of this responsibility; and for that purpose, in August, 1867, the beneficiaries under the trust, including one Mrs Cook, whose husband was abroad, granted him an obligation of relief, and appended to that obligation was a docquet in the following terms, by William Morrison, writer, Cupar-Fife:—“As the parties to the foregoing obligation have requested me to act in

the place of Mr Bayne (the pursuer) in managing and taking charge of the farms of Tailabout and Thomaston, I shall make arrangements to have the foregoing obligation carried into effect, and Mr Bayne relieved from his continuing obligation by 1st Oct., next. (Signed) WM. MORRISON." Pursuer thereupon resigned, and left the management of the trust in the hands of the remaining trustee and of Mr Morrison as his agent. The trust ultimately became embarrassed, if not insolvent, and pursuer, not having obtained his relief, brought this action.

There were mainly two questions raised—(1) Whether the subscription of Mrs Cook—one of the parties to the obligation of relief above mentioned—bound either herself or her husband; (2) Whether Mr Morrison had, by his undertaking above quoted, become personally liable to relieve pursuer. The L. O. (Jerviswoode) decided the first question in the affirmative, holding that Mrs Cook was, in her husband's absence, *præposita* in his affairs; and the second question in the negative, holding that Mr Morrison had merely undertaken to make arrangements in the course of his management with a view to securing pursuer's relief.

The Court altered:—*Held*, that a wife could not be *præposita* in this matter, as that would imply that a husband, as his wife's curator, could delegate his curatorial functions to his own ward; further, with reference to Morrison's undertaking, that he had so expressed himself as to justify pursuer in believing that he had obtained a direct personal guarantee for his relief.

Act.—J. C. Smith. *Agents*—Murdoch, Boyd, & Co.—*Alt.*—Trayner, Sol.-Gen., Black. *Agents*—D. Curror, S.S.C., D. Milne, S.S.C.

APP.—RUSSELL (GALLOWAY'S TR.) v. NICHOLSON & TAYLOR.—Nov. 26.

Bankruptcy—Expenses.—Appeal against a deliverance of respts. as commissioners in a sequestration in which appt. was trustee, fixing his commission at a certain sum. The L. O., on the report of the Accountant in Bankruptcy, sustained the appeal, and fixed the commission at a sum considerably beyond that allowed by respts. He also found respts. personally liable in modified expenses.

Respts. reclaimed against this finding of expenses, and the Court having ordered the accounts of both parties to be put in, found that up to the date of the accountant's report, the expenses of both parties should come out of the estate; but, *quoad ultra*, they adhered, and found that each party must bear his own expenses in the Inner House.

The Lord Justice-Clerk held that it was the duty of the commissioners to appear and defend their judgment; that they were the proper contradictors of the trustee in that matter; and that, therefore, they were entitled to be relieved of all necessary expenses. They ought, however, to have acquiesced in the accountant's report, and not to have litigated further.

Lord Cowan and Lord Neaves concurred in the result, in respect that the commissioners were called into the field by the L. O., who had ordered the appeal to be served upon them; but they reserved their opinions on the general question as to the right of the commissioners to litigate in defence of their judgments.

Lord Benholme dissented, holding that the commissioners had no right to appear at all, they not representing the creditors, and having no duties other than those specified in the statute.

Act.—Gifford, J. C. Smith. *Agent*—Adam Morrison, S.S.C.—*Alt.*—Decanus, Duncan. *Agents*—Jardine, Stodart, & Fraser, W.S.

HAMILTON v. LINDSAY, BUCKNELL, AND OTHERS.—Nov. 30.

Entail—Erasure—Evidence of Engravers.—Declarator to set aside the entail of pursuer's estate of Raploch and others, dated in 1730. It was *inter alia* pleaded that it was invalid in respect of an alleged erasure in the irritant clause, which ran—"Declaring hereby, that if the said Cromwell Price or any of the said heirs of taillie shall act and do in the contrair," etc. Pursuer said that the words *or any* with the exception of the "y" in "any" were written on an erasure. This was denied by defra., who further pleaded that, assuming the erasure, and striking out the words written thereon, the clause still remained intelligible.

After proof, in which engravers and other experts were examined on both sides, the L. O. (Barcaple) held that the erasure was proved, and that the same was fatal. Defra. reclaimed; and the Court altered, holding that the fact of erasure was not proved to their satisfaction. Lord Neaves strongly dissented from the course adopted by the L. O. in allowing a proof holding that the judge should, in the case of an alleged visible vitiation, inspect the deed for himself, and decide upon his own opinion, assisted, if need be, by a remit to and report from persons of skill.

Act.—Advocatus, Balfour. Agents—Morton, Whitehead, & Greig, W.S. —
Alt.—Sol.-Gen., H. J. Moncreiff. Agent—John N. Forman, W.S.

APP.—MACLEAN & HOPE v. THOMAS.—Dec. 4.

Sale—Rejection—Process—Additional Proof.—Appts., seed merchants, brought an action in the Sheriff Court of Fife against Thomas, farmer, for payment of the price of guano furnished to him. Respondent denied liability, and explained that the guano had been sent to him by mistake; that he had rejected it, and intimated his rejection of it, but that appts. had never taken it away; that it had lain in a shed on his farm for a long time; and that he did not now know what had become of it.

After proof, the S. S. (Taylor) found that appts. had failed to prove either that the guano had been ordered or used by resp. The Sheriff (Mackenzie) adhered. Appts. having appealed, lodged a minute craving additional proof, and offering to prove by the evidence of certain former servants of resp., that the guano had been used with his knowledge on his farms. On payment of £10 10s of expenses, the Court allowed the additional proof, and remitted the cause back to the Sheriff. After the evidence had been led, the S. S. and Sheriff again assoilzied. Appts. again appealed; and the Court adhered, holding, that whatever had been done with the guano, it was not proved that it had been used with the authority of resp., and that that was necessary to imply adoption by him of the contract of sale alleged by the appellants. Respondent, however, was only found entitled to half expenses, in respect that he had stood upon his extreme rights, and the case was not altogether in a satisfactory position.

Act.—Gifford. Agent—P. S. Beveridge, S.S.C.—Alt.—Decanus, Balfour.
Agents—Hill, Reid, & Drummond, W.S.

LORD ADVOCATE v. POLICE COMMRS. OF PERTH.—Dec. 7.

General Police Act—Jurisdiction.—Suspension and interdict by the Board of Works, to prevent certain threatened operations of the Police Commissioners for constructing a drain or sewer, by which complra. say the sewage of Perth, or a portion of it, would be discharged into the river Tay

at such a point as to pollute the water of that river, and render it unfit for the domestic purposes of the General Prison at Perth.

Respts. pleaded that the note of suspension was incompetent, in respect that the jurisdiction of the Court was excluded by s. 396 of the General Police Act; and that, in any view, complrs. were not entitled to neglect the appeal to the Sheriff provided by the Act, and come to the Court of Session for interdict. The L. O. (Ormidale) repelled these pleas as in bar of the action. The Court adhered. *Held* that, according to the allegations of complrs., the operations threatened were out-with the statute and unlawful; and that being so, the case could not be said to be, on the face of it, one of those in which the Sheriff had exclusive jurisdiction. The object of the appeal to the Sheriff provided by the Act was to have questions determined which arose in the administration of the statute and within its admitted scope. On these matters the Sheriff was sole judge, and final; but in this case, if the facts alleged were true, the Sheriff would have gone beyond his powers if he had sanctioned the operations of the respondents.

The Scottish Law Magazine and Sheriff Court Reporter.

FORFARSHIRE SHERIFF SMALL DEBT COURT, DUNDEE. Sheriff-Substitute SMITH.

FAIRWEATHER v. FAIRWEATHER.—Sept. 8, 1869.

Process—Expenses—Extrajudicial.—The defr. in this case, through his agent, opened negotiations with the pursuer, which, after some correspondence between the agents, proved abortive. The pursuer ultimately prevailed in the action, and in his account of expenses included charges for this correspondence. The auditor disallowed these charges, and the pursuer lodged objections to his report, in respect the charges disallowed were caused by the defr.'s conduct.

The S. S. pronounced an interlocutor, repelling the objections, with the following

Note.—The judicial expenses to which the pursuer has been found entitled mean the expenses *in the case*—that is to say, the cost of carrying on the cause in accordance with the rules of Court. When, after litigation has commenced, a truce is mutually proclaimed, and a correspondence takes place with reference to a proposal for a settlement, which ends in nothing, and leaves matters just as they were before, it cannot be regarded as one of the necessary incidents of the litigation. If a party wishes to avoid any such expense, he should either decline the correspondence altogether, or begin it subject to the stipulation that it is to be carried on at the opposite party's cost. In that case the expense might be recoverable *ex pacto*; but the case of *The General Board of Prisons v. Inverkeithing*, 14 D. 737, is an authority for saying that in general it is not a charge that ought to be allowed.

The pursuer acquiesced in this judgment.

Act.—Grant.—*Alt.*—*Heron.*

THE

JOURNAL OF JURISPRUDENCE.

ON THE CONFLICT OF LAWS ADMINISTERED BY THE SUPERIOR COURTS IN GREAT BRITAIN.

No. V.—CIVIL JURISDICTION *Continued—Domicile.*

I now proceed to collect from some of the more recent cases the species of facts which have been deemed important in fixing the domicile, and in evidencing its acquisition or relinquishment.

In the year 1840, two cases, on which opinions had been much divided in the Court of Session, were argued on appeal before Lord Cottenham in the House of Lords, and elicited from him a very lucid statement of some important points in the law of domicile. Lord Brougham also (who had not been present during the argument) took the opportunity of delivering some of his views upon the subject. These cases were *Lady Dalhousie v. M'Dowall*, and *Munro v. Munro*. They are reported 1 Robinson 475, 492. Besides the question of fact of domicile, they involved an important question of law arising out of the conflict occasioned by *legitimatio per subsequens matrimonium*; a question to which I shall return in its place. The determination of the fact of domicile was in the first of these cases comparatively easy; but in the second, raised a question of some nicety. I shall therefore state shortly the material circumstances of this latter case.

Sir H. Munro of F., the heir of an ancient Scottish family possessing the estate of F., in Ross-shire, was born in Scotland in 1763. He succeeded to the estate on his father's death, in 1781. He was educated chiefly in Scotland, and was, after leaving school, engaged for some time on foreign travel. In 1789 he came to reside with his mother at A., a mansion house on the family estate; F. Castle, the principal seat of the family, being at this time, as it had been left by his father, unfurnished and out of repair, and without any establishment being maintained there. In the year 1794, Sir H. proposed to his mother an arrangement by which she should go to reside in Edinburgh, and give up to him the house at A. This proposed arrangement failed to take effect, and a misunderstanding

having consequently arisen between Sir H. and his mother, he came to England. It was therefore clearly established that Sir H. Munro's domicile of origin was Scotch, and that he was domiciled in Scotland up to the time of his so coming to England in the year 1794.

Arriving in England, Sir H. came to London, where he for some time lived in lodgings. In August, 1795, he became acquainted with Miss L., who afterwards became his wife. In the month of March, 1796, he took a house in Gloucester Place, in London, on lease for 7, 14, or 21 years at the lessee's option, and having furnished it, went to reside there with Miss L. A daughter was there born of their intercourse on the 15th of May, 1796. At that time it appears to be assumed that no marriage had taken place. In September, 1801, a marriage was solemnised between Sir H. and Miss L., according to the forms of the English Church. In the usual affidavit, on which the requisite certificate was issued, Sir H. describes himself as of the parish of St Marylebone, and stated that his usual place of abode had been in the parish for the space of four weeks then last past.

All this time Sir H. had kept up a correspondence with his factor in Scotland, in which he repeatedly expresses an intention to return to Scotland. In some of his letters the return is spoken of as a projected "jaunt," "visit," or "stay," and it is intimated that it will be short. But in others he indicates an intention on his return to make F. Castle his home. On the 25th March, 1796, he writes:—"The appearance of the lawn under corn would often disgust me, especially should I live in the house, (which you know is what I intend, and to have myself supplied by the tenant in corn, straw, etc., etc.); and a lease of the home farm was accordingly prepared and executed, containing provisions in conformity with these instructions. And on the 27th October in the same year he writes:—"The hens and eggs now paid in kind are to continue to be so; it is easy, during my absence from the country, to dispose of them at a price equal to the conversion in the rental, and when at home I shall have occasion for them." From 1799 to 1802 Sir H. M.'s directions and acts indicating his intention to return to, and reside at, F. Castle became more marked, and this intention was ultimately manifested and carried out by his having the castle repaired and furnished in a costly manner, and by his coming to reside there with his wife and daughter in November, 1802. He remained there with his wife and daughter until the death of his wife, who was drowned while bathing near the castle in August, 1803, and he continued to reside there with his daughter until 1808, when he took her to London for the purpose of education. In the meantime, the house in London (the lease of which he continued to hold without availing himself of the break which occurred at Christmas, 1802), was left in charge of a single domestic.

It is not very material to state further the facts of Sir H. M.'s residence. For considerable periods afterwards, it was at F. Castle, and for considerable periods in London. The present action was raised at the instance of the daughter, concluding for a declarator of legitimacy, and

of her right to succeed her father in the entailed estates. Her contention was supported by the pleas recorded on behalf of her father, but opposed by the substitute heirs.

To the question of legitimation I shall return hereafter. Meantime, it is sufficient to observe that it was thought material to establish the fact of Sir H. M.'s domicile both at the time of the birth of his daughter and at the time of solemnising the marriage.

The argument for an English domicile is put strongly and clearly in the opinion of the minority of the Lords of Session as follows:—
 "On the whole, it appears to us clear that in 1794 Sir Hugh removed his residence to London, with a view to a long and settled, though indefinite abode, and that in the course of that residence he had lost his former Scottish domicile and acquired a new one in England long before the period of his marriage in 1801. He had lived by that time more than seven years continuously in the metropolis. In 1795, a year before the birth of the pursuer, he had taken the lease of a house there for a period of twenty-one years, with a break at the end of seven years, of which he did not avail himself. He had all this time no adequately furnished house for his accommodation, and no domestic establishment in Scotland; and in 1795 he had let the mains or home farm around his Scottish castle for seven years, with a power, which he did not exercise, of resuming it at the end of three."

Lord Cottenham, in giving judgment, after showing that the question of legitimation depended on the domicile, says:—

"In both cases (i.e., *Countess of Dalhousie v. McDowall* and *Munro v. Munro*) the question of fact remains to be considered—namely, what was the domicile of the father? In both cases the domicile of the father was originally Scotch, and the question is, whether he had at the time of the marriage lost this domicile of origin. Questions of domicile are frequently attended with great difficulty, and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles *that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile.* Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in *Somerville v. Somerville*,* and from which I see no reason for dissenting. So firmly, indeed, did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned and a new domicile acquired, but that again abandoned and no new one acquired in its place, the domicile of origin revives. To

* 5 Ves. 787.

effect this abandonment of the domicile of origin and substitute another in its place, it required '*le concours de la volonté et du fait, 'animo et facto;*' that is, by actual residence in the place, with the intention that the place then chosen should be the principal and permanent residence '*larem rerumque ac fortunarum suarum.*' There must be residence and intention; residence alone has no effect *per se*, although it may be most important as a ground from which to infer intention."

In commenting on the facts in evidence, Lord Cottenham proceeds to observe that there was a sufficient reason, independently of any intention of changing his domicile, for Sir H. M.'s leaving Scotland in 1794. He further, in answer to certain remarks of Lord Corehouse (who in the Court below had argued that the expressions of intention in the letters indicated a short visit and not permanent residence), says:—"These observations would be highly important if the question was, whether by his subsequent residence in Scotland he had acquired a new domicile there; but they do not appear to me to touch the question whether he had abandoned his domicile of origin in that country—a question which can only be affected by evidence of an intention to do so.

"That he took a lease of the house in Gloucester Place, and formed an establishment there, has been much relied upon; and in the absence of better evidence of intention as to his future domicile, that might be important as affording evidence of such intention; but cannot be of any avail when, from the correspondence, the best means are afforded of ascertaining what his real intentions were. The having a house and establishment in London is perfectly consistent with a domicile in Scotland. This fact existed in *Somerville v. Somerville* and *Warrender v. Warrender*. Taking, therefore, the rule of law, as to the domicile of origin, to be what I have before stated, and applying the evidence to that rule, I do not find it proved that the appellant's father acquired a new domicile in England, with the intention of making that his sole residence, and abandoning his domicile of origin in Scotland."

The observations of Lord Brougham in this case are chiefly important in the present question, as expressing his concurrence with Lord Cottenham in accepting, as correct, the general rules laid down by Lord Alvanley in the case of *Somerville v. Somerville* (Jany. and Feb., 1801; reported 5 Vesey 750).

It will here be a convenient place to introduce these rules, so important in the law of domicile as now understood in our Courts.

Somerville v. Somerville (5 Vesey 750) was a suit instituted in the Court of Chancery, in England, for the administration of the estate of Lord Somerville, who died in London (intestate) in 1796 during the session of Parliament. Lord Somerville, a nobleman of Scotch extraction, after succeeding to his father's estate and title, maintained the family mansion in Scotland with an establishment suitable to his

rank and fortune, and a house and establishment in London of a comparatively small description. Being a Representative Peer, and usually remaining in London during the session of Parliament, he divided his residence nearly equally between both houses. He was possessed of lands in both countries; but the bulk of his movable or personal estate was invested in the funds and stood in the books of the Bank of England, in his name, described as "of Henrietta Street, Cavendish Square." There could be no doubt as to the jurisdiction of the Court of Chancery over the estate within England; and this question being at that time one of some novelty, it was urged, by those interested in maintaining the English rules of succession, that, the death having taken place in England, such of the property, at least, as was within the jurisdiction of the Court, ought to be distributed according to the law of England.

Lord Alvanley, on considering the authorities cited to him [including many passages from the Civilians, ancient and modern, and the cases of *Bruce v. Bruce*, House of Lords, 15th April, 1790, 7 Bro. P. C. 566 (cf. 3 Paton 163); *Balfour v. Scott*, H. of Lords, 11th April, 1793, 6 Bro. P. C. 550; *Omanney v. Bingham*, H. of Lords, 18th May, 1796 (Sir Charles Douglas' case), 3 Ves. 202, 3 Paton 448; *Bempde v. Johnstone* (Lord Annandale's case), 3 Vesey 202], extracted from them these general rules:—1st. *The succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death*; 2dly. *Though a man may have two domiciles for some purposes, he can only have one for the purpose of succession*; 3dly. *The original domicile, or the domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile*.

In December, 1857, a case came before the Court of Session (whose decision was afterwards confirmed by the House of Lords), which, as observed by the Lord President (Lord Colonsay), presented within itself almost all the circumstances that have been stated in any of the cases, or suggested by jurists as matters for consideration in determining questions of domicile. This was the case of *Donaldson* (or *Maxwell*) *v. M'Clure* (Reported 20 D. 307; 22 D. H. of L. p. 7; 3 M'Queen 852).

The representatives of Mrs M'Clure, a wife who died before the "Moveable Succession Act" (18 Vict., c. 23, sec. 6), claimed from the surviving husband a share of the goods in communion, and the question whether or not they were entitled, depended on where the husband had his domicile at the time of his wife's death (*Lashley v. Hog*, 4 Paton 581).

M'Clure (the husband), who was of humble parentage, had his domicile of origin in Scotland. Many years previously to 1848 he had settled in Wigan, where he became prosperous, married the daughter of a townsman (who was, like himself, of Scotch birth), was

made a town councillor and a magistrate, acquired real estate, and occupied a commodious house in a street called Wallgate. Previously to the year 1848 he had made some purchases of land and houses in Scotland. In that year (1848) his house in Wallgate was taken possession of by a railway company, and he removed with his family into a smaller and less commodious house in the same town. He made some endeavours to get a larger house in the country near Wigan, but unsuccessfully. His wife at this time being in bad health, and requiring change of air, he turned to account a piece of land which he had acquired in Scotland in the year 1842, on which there was a house. He removed the tenant, and enlarged and improved the house at an expense of £2500, and having furnished the house comfortably, took up a residence there with his wife and servants, there being no children. He did not, however, abandon the house at Wigan, which remained in charge of a housekeeper, nor did he give up the municipal office which he held there. The house at Wigan was always kept ready for him. He frequently came and stayed there, and his wife came there once or twice a year. Up to a few months previously to his wife's death, which took place about 2½ years after taking up the residence in Scotland, he retained the office of town councillor at Wigan; and up to the time of his wife's death and for long afterwards he continued to hold the commission of the peace, as qualified by his residence at Wigan. During his residence in Scotland, it had been proposed to him to become a town councillor at Dumfries, but he had declined, alleging as his reason his engagements at Wigan. But during the 2½ years between taking up the Scotch residence and his wife's death, he resided much more at the house in Scotland than at Wigan, and his wife resided there almost entirely, and they were both residing there at the time of the wife's death. The evidence of M'Clure himself, which was given in the case in his own interest, positively denied an intention on his part to reside permanently at the house in Scotland and to leave Wigan, and asserted that his intention in taking possession of the house in Scotland was only to reside there occasionally for the benefit of his wife's health, which had brought him there.

The Court of Session (whose decision was affirmed in the House of Lords) unanimously held—1st, That previously to 1848, M'Clure had abandoned his domicile of origin and acquired a domicile in England; 2dly, That it was not proved that M'Clure had at the time of his wife's death changed that domicile for a Scotch one, and they assailed the defender.

The principles which are established or illustrated by this case appear to be the following:—

(a) Change of domicile, from a domicile of habitation as well as from a domicile of origin, must be effected *animo et facto*, by abandonment of the old and acquisition of the new domicile.

(b) Where a change of domicile is relied on, the *onus* of proof is on the party alleging the change.

(c) In a question of change, the domicile of origin is of weight, but not of great weight. (Perhaps this only means that domicile of origin is seldom unaccompanied by circumstances which bear upon the question of intention. In the present case these circumstances were very slight, and little weight was accordingly given to them).

(d) The retention of municipal office and of the magisterial office requiring a residential qualification, is of weight in evidence.

(e) The direct evidence of the person whose domicile is in question, although an interested party, as to his own intention, may, if corroborated by circumstances, have some weight assigned to it.

Two features in the last case may be noted as worthy of remark. First, the connection of domicile with municipal offices, though here merely incidental as an adminicle of evidence, was one which, in the Roman law, gave domicile much of its importance. For it is to this connection of domicile with municipal office that we owe the texts of the civil law on which the whole modern doctrine of domicile is founded,—l. 7, C. de Incolis (x 35), cf. l. 27, Dig. ad municipalem, (l. 1). I take this occasion for an observation on the last quoted text of the Digest. Ulpian, contrary to the opinion of Celsus, thought it possible that a man might have two domiciles, if his residence and *animus* were equally divided, though it was difficult for such a case to occur; just as it was possible a man might have no domicile, if, having abandoned one abode, he is on a voyage or journey, "*quaerens quo se conferat, atque ubi constituat domicilium*." Had M'Clure not manifested his preference by declining municipal office in Dumfries, his case would have been precisely the case imagined by Ulpian of a double domicile. Modern law, however, having made *domicile* the criterion of *succession*, is obliged to revert to the opinion of Celsus, and reject the possibility of two concurrent domiciles; and, in the case last imagined by Ulpian, our Courts, instead of refusing to assign a domicile, will resort to the domicile of origin. Secondly, I note that the case of *M'Clure*, as contrasted with that of *Somerville*, illustrates a shrewd observation of Huber (quoted in the arguments of the *Somerville* case) to the effect that the domicile of a citizen is in town, where his principal concerns are, the country residence being considered as merely *voluptatis causa*; but that the reverse is the case as to a nobleman, (5 Vesey, pp. 762, 783). Of course this distinction cannot be maintained as a principle in our time, when the formerly well-marked line of demarcation between the burgesses and the "lesser nobilitie" has long been obliterated. But the observation may still be useful in furnishing an element for judgment in a case where the arguments on each side are so nicely balanced as in that of *M'Clure*.

The next case I shall refer to is that of *Bell v. Kennedy*, which came before the House of Lords, May 14, 1868, on appeal from sixteen interlocutors of the Court of Session, (Law Rep., 1 H. of L. Sc., 318). This was also an action in which the representatives of a wife, who died in 1838, claimed from the husband a share of the goods in communion.

The defender, Mr Bell, had his domicile of origin in Jamaica, but had connections in Scotland. He went to Scotland as a boy for purposes of education, and returned to Jamaica, where he lived until 1837. In 1828 he had married the pursuer's mother, then Miss H., who was a Scottish lady on a visit to the island. Some time before 1837, Mr Bell acquired two small properties in Scotland, which were conveyed to him in satisfaction of a legacy of his wife's secured upon them. He had also carried on some correspondence with an agent in Scotland, by which it appeared that he had some thoughts of buying a Scotch estate for the purpose of coming to reside on it. In 1837 he left Jamaica, without any intention of ever returning there, and arrived in London in the month of June of that year. In about a fortnight afterwards he went to Edinburgh, with wife and children, and there resided for some time in the house of his mother-in-law. While there, he resumed inquiries after an estate to be purchased for residential purposes, and he had some negotiations about such proposed purchase. But no fixed residence having yet been determined upon, and his wife expecting her confinement, he took a furnished house for a year, and took up his residence there, with his wife and children, and servants whom he had hired for his accommodation. Shortly afterwards, in September, 1838, his wife died in her confinement. The evidence bearing upon the question of intention was voluminous. It was to the effect (as stated by the Lord Chancellor Cairns) that, prior to the time of the wife's death, the defender had evinced a great and preponderating preference for Scotland as a place of residence; but there were also expressions in the correspondence indicating that he was, in some points, dissatisfied with Scotland as a place of residence, and he looked upon the contingency of his settling elsewhere as possible. He ultimately, after his wife's death, bought landed property in Scotland, in which he invested the bulk of his fortune, and fixed his residence there. The House of Lords (Lord Cairns [Chancellor], Lords Cranworth, Chelmsford, Westbury, and Colonsay), reversing the sixteen interlocutors of the Court of Session, unanimously held that the defender, at the time of his wife's death, was not proved to have changed his domicile of origin for another domicile, by acquiring *facto et animo* a fixed and settled abode in Scotland. "The question is," said Lord Cairns, "whether the appellant, before the 28th of September, 1838, the day of the death of his wife, had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country," (p. 311). Lord Westbury, using the words of the Digest above quoted, describes the defender as still, at the time of his wife's death, *quaerens, quo se conferat, atque ubi constituat domicilium*, (p. 321). The principle that the *onus* of proof is upon the party alleging a change of domicile is again asserted in this case, and the proof desiderated is that of "fixed intention to reside in Scotland," (Lord Cairns, p. 318); "settled purpose of taking up a fixed and settled abode in Scotland," (Lord Westbury, p. 321); "fixed intention of establishing a permanent

residence in Scotland, carried out by actual residence there," (Lord Chelmsford, p. 319).

The recent case of *Udny v. Udny* has already been mentioned and commented on. It is reported 5 Macph. 164, and Law Rep., 1 H. of L., Sc. 441. This action was a declarator of bastardy. The defender was the son of Col. R. Udny, by A. A., an Englishwoman to whom Col. R. was not married at the date of defender's birth, but whom he afterwards married in Scotland on the 2d of January, 1854. The question was, whether or not the defender was legitimate *per subsequens matrimonium*. This question must, as in the case of *Munro v. Munro*, be answered in the affirmative, if Col. R. Udny was, at the time of the defender's birth, and also at the time of the marriage, domiciled in Scotland.

J. Udny, the father of Col. R. Udny, and grandfather of the defendant, was born at Aberdeen, in 1727, of Scottish parents, and his domicile of origin was undoubtedly Scotch. He went to Italy several years before 1760, lived in Venice, and there engaged in business. In 1761 he was appointed British Consul at Venice, and held that office until 1777, when he was appointed British Consul at Leghorn, an office which he held until his death, in the year 1800. In 1794, J. Udny's elder brother became proprietor of the Udny entailed estate, and J. Udny became substitute heir of entail next in order of succession. At this period there was some correspondence between the two brothers, and J. Udny became the purchaser of some estates adjoining the entailed estate held by his brother. In 1777 J. Udny had married an English lady, and she, in 1784, went to London, where she remained, accompanied by her children.

Col. R. Udny, the defender's father, was born at Leghorn, in 1779. From 1784 to 1794 he lived with his mother in London. In 1794 he was sent by his uncle (the proprietor of Udny) to Edinburgh University, where he resided until 1797. In 1796 he visited Aberdeen, where he was entertained by the magistrates of Aberdeen, and had the freedom of the city conferred on him. He entered the army in 1797, and was with his regiment from place to place until 1812. In 1802 he succeeded, on the death of his uncle, to the estate of Udny. In 1812 he married E. F., an English lady, and from that year until 1845 (a period of thirty-two years), he lived, with his wife and family, in a house in Grosvenor Street, which he rented, and which was his sole residence during those years, except occasional country houses in England. There was no house on the Udny estate. He came to Scotland nearly every year to look after his estate, and he exercised his rights and discharged his duties as a landowner. He was a justice of the peace, deputy-lieutenant, and a member of various clubs and associations in the county of Aberdeen; and he had no employment in London except such as a taste for the turf gave him. In the year 1845 he went to Boulogne, on account of pecuniary embarrassments and the pressure of creditors. In 1846 his wife died. At Boulogne he contracted an intimacy with A. A.,

which resulted in the birth of the defender, in 1853. In November of that year he came to Scotland, with the defender's mother, and after about six weeks' residence there was married to her. After this he continued to reside in Scotland until his death, which took place in Edinburgh in 1861.

It was held, both in the Court of Session and in the House of Lords, that J. Udny, the grandfather, had never lost his Scotch domicile, the presumption from residence being rebutted by the nature of his employments in connection with the public service of this country, and by expressions in the correspondence with his brother of a rooted attachment to Scotland. Consequently, the domicile of origin of Col. R. Udny was Scotch. The Second Division of the Court of Session held that Col. R. Udny had never abandoned this Scotch domicile. But the Law Peers in the House of Lords thought it unnecessary to pronounce a decision on this point; the Lord Chancellor (Wood) and Lord Westbury leaning to the opinion that he had by the long residence in England evinced such an *animus remanendi* as, combined with the residence itself, amounted to a change of domicile. But the Lords unanimously held that if Col. R. Udny had ever acquired a domicile in England, he abandoned it when his establishment there was broken up and he went to live at Boulogne, and that then the domicile of origin was resumed.

The question whether Col. R. Udny had ever lost his domicile of origin would have been one of great nicety had it been necessary to decide it. It lies, indeed, on the border land between two classes of cases. There is one class of cases where a person takes up a residence in a place for the sake of making his livelihood, and with an indefinite prospect or hope of realizing a fortune which will enable him to return. Such is the Anglo-Indian domicile in the case of *Munroe v. Douglas*, 5 Madd. 379. And a strong case of a similar kind is that of *Lowndes v. Douglas*, 23 D. 1391. In such cases the indefinite hope or prospect does not rebut the presumption of intention which is furnished by the fact of residence of a permanent character. Of a similar class is the case of Sir Charles Douglas (*Omanney v. Bingham*, 3 Paton 448), where the ruling object was a desire of professional advancement in the navy, and residence in England was taken up for that purpose. There are cases, on the other hand, of a person taking up a residence in a place to which he has no tie but the preference of the hour, and in this case the presumption arising from the fact of residence is more easily rebutted; and the definite expectation of succeeding to a landed estate in another country, combined with expressions of intention to live there on the happening of that event, may in such a case furnish sufficient evidence to rebut the presumption arising from the residence. Thus, in the case of *Aikman v. Aikman*, 21 D. 757, (3 M'Queen 854), a Scotch domicile of origin was not lost by occupation continued for many years in the mercantile marine service of the East India Company, although the greater part of the intervals between voyages were spent in England; nor by taking a house in London and re-

siding there with a mistress for seven years, with the exception of two visits to Scotland for a few months at a time. In this case the distinction now insisted on, is stated by Lord Chancellor (Campbell) in the following terms:—"If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such a residence in a foreign country from putting an end to his domicile of origin. But a residence in a foreign country for pleasure, lawful or illicit, which residence may be changed at any moment without the violation of any contract or any duty, and is accompanied by an intention of going back to reside in the place of birth on the happening of an event which in the course of nature must speedily happen, cannot be considered as indicating the purpose to live and die abroad."

Constraint of circumstances may, therefore, have opposite effects. When circumstances constrain residence for the purpose of making a livelihood, they assist the presumption derived from residence, of intention to remain (*Munroe v. Douglas*, *Lowndes v. Douglas*, *supr. cit.*, *Stanley v. Bernes*, 3 Hagg. 437). But it is different where the constraint operates to drive away and exclude a person from a particular country. And here there is a distinction between the domicile of origin and a domicile of habitation. For, as we have seen in the case of Udny, the circumstances of leaving England under pressure of creditors did not prevent the abandonment of the acquired English domicile. But in *Pitt v. Pitt*, where the question was, whether the pursuer had abandoned his English domicile of origin and acquired a domicile of habitation in Scotland, the circumstance that he had left and was kept away from England by the pressure of creditors, was held to militate most strongly against the presumption that he had acquired a new domicile (3 M'Queen, 637, 644). And so in the case of a French *émigré* who was for many years, after the Revolution, settled in England. The circumstances of inconvenience which drove and kept him away from his native country were held sufficient to rebut the presumption, which long residence in this country would otherwise have raised, of intention to abandon the domicile of origin (*De Bonneval v. De Bonneval*, Curteis, 856).

From the cases above commented on, with a few to be cited immediately, the following rules, expanded from the third of Lord Alvanley's rules above given, may be safely deduced:—

(f) The domicile of origin continues to be the domicile until a domicile of habitation, or of abode and choice, has been acquired elsewhere.

(g) Change of domicile, whether from a domicile of habitation or from a domicile of origin, must be effected, *facto et animo*, by manifesting and carrying into execution an intention of abandoning his former domicile and taking another as his sole domicile.

(h) A domicile of habitation (not being the domicile of origin) may be lost by mere abandonment, *animo et facto*, in which case the domicile of origin is resumed.

(j) Where a change of domicile is relied upon, the *onus* of proof is upon the party alleging the change; and with regard to the mode in which this *onus* is to be discharged, the following short rules may be extracted from the cases:—If a person leaves the country in which he has been domiciled, and takes up a residence of a permanent character in another, as the sole place of his abode, the *onus* of proof is discharged so far as the *fact* is concerned. Nothing less than this appears to be sufficient.—(*Campbell v. Campbell*, 23 D. 256; *Hodgson v. De Beauchesne*, 12 Moo., P. C. 285; *Bell v. Kennedy*, *supr.*) But if the *onus* of proof is discharged as to the *fact* in the way just described, then a presumption of intention is raised, which is much strengthened if the means of profitable occupation or livelihood depend upon residence in the place (*Lord Adv. v. Lamont*, 19 D. 779; *Stanley v. Bernes*, 3 Hagg. 373-447; *Munroe v. Douglas*; *Lowndes v. Douglas*; *Omanney v. Bingham*, *supr. cit.*), and which also becomes stronger with the length of time that the residence continues (*Stanley v. Bernes*, *supr.*) The presumption of intention so raised is not rebutted by proof of an indefinite hope or expectation of returning when a fortune is realised (*Munroe v. Douglas*, *Lowndes v. Douglas*, *supr. cit.*), still less by proof of the *animus* to remain a British subject, which is quite consistent with being domiciled abroad (*Stanley v. Bernes*, *supr.*) But may be rebutted by expression of intention, combined with one or more of the following facts:—1. That the residence is for a temporary purpose, or is *voluptatis causa* merely (*Munro v. Munro*, *Maxwell v. McClure*, *Aikman's case*, *Campbell's case*, *supr.*) 2. That it is connected with a post in the public service of the United Kingdom, (*Udny v. Udny*). 3. That there is a definite, though deferred, expectation of returning; e.g., on the opening of a succession to an estate, which must happen some day (*Aikman v. Aikman*, *Pitt v. Pitt*). 4. That absence from the country of the deserted home is constrained by pressure of creditors, or other circumstances not necessarily permanent, which render a residence there inconvenient (*Pitt v. Pitt*, *De Bonneval v. De Bonneval*).

(k) Lastly,—Actual residence in a certain place is of the essence of an acquired domicile of habitation, so that the purchase of a residential property, and preparing it at considerable expense, combined with a roving kind of residence in the same country (Italy) without actual settled abode being taken up at the place of residence so prepared, has been held not sufficient for the acquisition of a domicile, (*Atty. Gen. v. Dunn*, 6 Mees. and Wels. 511; cf. *Lord Adv. v. Lamont*, *supr.*)

R. C.

THE CIVIL APPEAL TO THE CIRCUIT COURT—SUGGESTIONS FOR THE IMPROVEMENT OF THE EXISTING LAW.*

THE existing law relative to civil appeals to the Circuit Court of Justiciary is open to the following grave objections:—

1. It is unequal. In small debt cases—*i.e.*, cases under £12 in value, appeal lies on the ground of corruption, malice, and oppression, wilful deviation from the statute (*i.e.*, "Small Debt Act," 1 Vict. c. 41), or deviation preventing substantial justice and incompetency, including defect of jurisdiction, whereas in all other Sheriff Court cases appealable—*i.e.*, cases up to £25 in value, not being small debt cases, it lies only on the last ground—defect of jurisdiction.

2. There is no appeal on any point of law arising out of the merits of the case. As this class of cases cannot, from their small value, come before the Court of Session, this leaves the litigant in small debt cases absolutely in the hands of the Sheriff-Substitute, and in other cases, of the two Sheriffs, and leaves the Sheriffs without the means of obtaining an authoritative exposition of the law. It has thus happened that different law has been administered in different Sheriffdoms, and even by different Sheriff-Substitutes in the same Sheriffdom.† Nor has the intelligence of the Sheriffs themselves failed to observe this result and to desiderate some simple form of appeal.

3. The clause of the Small Debt Act specifying the grounds of appeal has been drawn with great want of precision, and though something has been done for its interpretation by decisions, these have not been uniform, and it is still a trap for suitors. To instance two points. It is difficult to hold any deviation from the statute not wilful, if the Sheriff and parties knew its provisions, which, of course, they must be presumed to do. Yet the Judges have sometimes‡ read the *or* following wilful as *and*, by which construction no deviation from the statute, however wilful, will justify an appeal, unless it is shown substantial justice has not been done. This construction, not, perhaps, yet quite fixed, is one we are far from thinking to be regretted in itself, but it would certainly not occur to a person reading the Act as its natural meaning. Again, the word incompetency in the third ground of appeal under the Small Debt Act has seldom been founded on, except in the case of defect of jurisdiction; but it was recently§ held by an ingenious Judge, to cover the neglect of a Sheriff to

* For a full statement of the existing law, the reader is referred to the *Journal of Jurisprudence* for August, 1869.

† For an example of this, see *Journal of Jurisprudence*, xi., 551 and xiii., 148, as to proof of loans under £100 Scots by parole. The case of *Annand v. Annand's Trustees*, 8th Feb., 1869, 41 *Sc. Jurist*, 280, fortunately brought this question under the cognizance of the Supreme Court by the accident of there having been a series of advances, each under £8 6s 8d, which made the whole value of the cause above the appealable value.

‡ See *Mowat v. Martine*, 20th June, 1856, 2 *Irv.* 435.

§ See *Murray v. Mackenzie*, 21st April, 1869, 41 *Sc. Jurist*, 394.

entertain a plea of prescription, *ex facie* applicable, a decision which, if followed, would logically bring under this ground of appeal most, if not all, errors in point of law.

4. The fee of £1 14s in causes the value of which is frequently under £12, and always under £25, is far too large.*

5. Although these appeals are in every respect civil cases, they have to be brought before the Court of Justiciary, and if afterwards certified they are transferred by a process in which mistakes have more than once occurred in one of the Divisions of the Court of Session.† Should the proposal, which appears to meet general approval, of making all Judges of the Court of Session Judges of the Court of Justiciary be carried out, there would be no difficulty in civil appeals going before them in their proper character as civil Judges. Even if this were not done, if civil business, in the shape of proofs and jury trials, became a part of the usual work of every circuit, the Judge by whom the civil business was taken might also hear the appeals. Experience has now shown that even in the High Court one Judge is in all ordinary cases adequate to the satisfactory discharge of the criminal business, and the greater part of the time of the second Judge on circuit is practically thrown away.

We have never heard any person defend the law on the subject of the civil appeal to the Justiciary Court as it at present stands, except on the ground that it applies to so small a number of cases that it is not worth while to alter it.

This defence, of little value at any time, is at present of none, when the whole procedure in the Scotch Courts, both inferior and superior, is the subject of inquiry, and if a definite improvement can be pointed out it is to be hoped that the Commission will not fail to consider it because it is small.

The points to be considered in regard to reform of this mode of appeal are—1. On what grounds should it lie, and in what form should it be taken. 2. Should it be with or without caution or consignation, and with or without leave of the Judge from whom it is taken. 3. What should be the limit in value, if any, of the causes appealable.

1. It is thought that appeal should be open not merely on the limited grounds which at present exist, but on any ground of law. That an erroneous judgment on law should stand is not merely unjust in the particular case, but of pernicious consequence in other cases, more especially when no authoritative means of settling the law

* Mr Smith, Procurator, Brechin, in his evidence before the Law Commission, i., p. 259, stated, "I think the Clerk of Justiciary claims £1 14s for lodging an appeal with him, and he claims something for attendance during the discussion. His fees are heavy. It is a considerable time since I paid them, but another gentleman told me he paid them within twelve months. I never could find any authority for exacting these fees." We have also sought in vain for any authority by Act of Parliament or Act of Adjournment, but they are probably now fixed by long usage. This fee does not include the dues of Extract.

† See *Cambuslang Road Trustees v. Graham*, 26th Nov., 1845, 2 Brown 550; *Beattie v. Gemmell*, 4th Feb., 1862, 24 D. 431.

exists. Something may undoubtedly be said for allowing appeal also against an erroneous judgment on evidence; but in cases of small value, to which, on grounds presently to be explained, these remarks are confined, the evidence is seldom complex, and the material facts are generally beyond dispute. The simplest form of appeal on the merits in law is by a Case in which the material facts are concisely stated and the questions of law definitely raised.* Recent experience in Scotland in cases stated by the Quarter Sessions, 7 & 8 Geo. IV., c. 53, sec. 84; by the Inland Revenue Commissioners, 13, 14 Vict., c. 97, sec. 14; in Registration Appeals under 31 & 32 Vict., c. 48, and prior election statutes, as well as in the Special Cases introduced by the recent Court of Session Act and a more extended experience in England; see 12 & 13 Vict., c. 45, sec. 11 (Quarter Sessions Cases); 13 & 14 Vict., c. 35 (Special Cases in Chancery); 13 & 14 Vict., c. 61, sec. 15 (County Court appeals); 20 & 21 Vict., c. 43, sec. 3 (Justice of Peace criminal appeals); and 6 & 7 Vict., c. 18, sec. 42 (appeals from the Revising Barristers), have proved the satisfactory nature of this form, both for original and appellate procedure, provided it be carefully worked. The Case should be stated by the parties, if they can agree, with the approval of the inferior Judge, and if they differ, by the Judge.

There would, however, be a class of cases to which this form of appeal would not apply, and it would probably be necessary to retain either the present form of appeal by note, or some equivalent for appeals, on the ground (1) of defect of jurisdiction; (2) of defect of justice from malice or corruption on the part of the Judge. On neither of these could the inferior Judge be reasonably expected to state a case. As to the latter, we have pointed out, in the review of the decisions, there has been no case of successful appeal. This is honourable to the Scotch Sheriffs, but not a ground for omitting the right of appeal on such grounds from any future law. There could be no greater scandal in the administration of justice than that a decree, however small in value, based on malice or corruption, should stand. On the other hand, the doctrine of constructive malice, which has received countenance from the dicta of some Judges,† and often leads to "malice and oppression," being inserted as a ground of appeal under the existing law, where there is not a shadow of actual malice intended to be proved, is bad. Neither malice nor corruption should be allowed to be averred against a Judge, without the strictest specification, an offer of instant verification, and under penalties if the proof fail. It is to be regretted that our old law‡ has been allowed to fall into abeyance (into desuetude it has not gone yet), under which defaming or murmuring Judges was an undoubted point of dittay; because, as

* On the advantage of procedure by Special Case, see speech of Mr Fraser, Sheriff of Renfrewshire, *Journal of Jurisprudence*, x., 178, in which the appeal in this form from decisions of the justices in summary criminal proceedings is defended, and the manner in which it was ejected from the Summary Procedure Bill exposed.

† See *L. Duns in Phillip v. Trustees of Forfar Building Society*, 41 *Scottish Jur.* 1.

‡ See 1540, c. 104.

Hume, with his usual weight and precision, expresses it, it is "an offence not more interesting to the person slandered than to the public, who have the deepest concern in maintaining the opinion of his pure and conscientious administration of his office."*

Mere deviation of form should not, we think, be a ground of appeal. Where justice has not been done by an erroneous judgment, there will be a ground in law on which a case may be stated. The appeal, in whatever form, should only be allowed from the final judgment; but it should be competent to raise in it any point of law on the merits of the case, though dealt with by a prior judgment.

2. In order to prevent frivolous appeals, or appeals for the purpose of delay, some precaution would require to be taken. Three forms of precaution have been tried—(1) requiring the leave of the inferior Judge; (2) caution; (3) consignation. We incline to the first of these, and if the inferior Judges were, as a class, competent and firm, which, with few exceptions, we believe to be the case, we should apprehend no risk of injustice in placing the absolute discretion of allowing appeal in such cases in their hands. It is not difficult to see, after a case has once been pleaded, whether there exist probable grounds for a difference of opinion as to the judgment upon it. The first quality of a good Judge is to form a decided view upon sound grounds; but the second, without which the first will hardly exist, is to be able to see what may be urged in favour of a contrary judgment. It is this which makes thorough training as an advocate the best preparative for the judicial bench, and has rendered British Judges, as a rule, superior to Continental. The saying that a good advocate makes a bad Judge is based upon a low ideal of the functions of an advocate.

Should it be found, however, that the Sheriffs refused to state cases where it was reasonable that they should be stated, the check might be adopted, which is used in certain cases in England, of allowing the party, on satisfying the Supreme Court in Edinburgh, by *ex parte* motion, that the case was fit for appeal, to obtain an order compelling the Judge to state a case. Of the other alternatives, we think consignation preferable to caution. Caution is practically a bar to appeal in all cases where the litigant is poor, and even where he is not, the difficulty is considerable of finding a friend ready to bear the result of an adverse judgment. Consignation would also, it is true, prevent appeal in some cases, but it does not appear to be unjust to prevent a suitor with a judgment against him from litigating further, unless he is able to show that he can satisfy a final judgment affirming that appealed from.

The sum consigned should, in the case of a defender, be the sum found due by the judgment, and a certain fixed sum to meet the expenses of the appeal; in the case of a pursuer the latter only. We have already stated an opinion that the expenses in appeals to the

* Hume 1, 341. See also 406. A recent case (*Robertson v. Duke of Atholl*) would have afforded a good opportunity for the revival of this point of ditty. Since the above was written a prosecution has been ordered by Crown Counsel.

Circuit Court both should and might be limited to a very moderate amount.

3. As regards the value of the causes in which appeal should be allowed to the Circuit Court, it appears to us that the best limit would be that below which appeal is at present incompetent to the Supreme Court in Edinburgh, viz., £25.

Such a limit must be in great measure arbitrary,—the one proposed has the advantage of being already in operation. It also probably fairly covers all cases which can be properly denominated of small value,—being rather more than a year's wages of an ordinary labourer.

* A suggestion has been made that a much higher limit (£100 or £200) should be taken, below which appeals should not come to the Court of Session in Edinburgh, but only to the Circuit Court. It is urged in favour of this that the expense of such appeals would be diminished, that country agents would be able to conduct them, and that the time of the full Bench is improperly taken up by such appeals which, it is said, seldom raise difficult points of law. The first of these considerations must be admitted to have some validity; there would certainly be saving of expense if such appeals were taken at circuit. On the other hand, it must be remarked that the expense of appeals in Edinburgh, since the recent Court of Session Act, is now so moderate as not to deter suitors in cases even of comparatively small value, and might be still further reduced if printing† were not a necessity in the eyes of a Scotch Judge of the Supreme Court.

The second consideration the recent Court of Session Act in great measure deprives of force, for country practitioners may now act as agents in appeals in the Court of Session. Nor does it appear improbable that the whole system of agency in Scotland will before long undergo revision. Neither of these considerations, however, though they no doubt deserve to be taken into account, are the turning point of the question, which is truly this,—Would Circuit form a good Appellate Court? Is the time of the full Bench in Edinburgh improperly occupied with appeals? We answer both these questions in the negative. The English Circuit, to which we must look as the most thoroughly tried model in this matter, never has been an Appellate Court. The smaller number of Judges and of counsel attending circuit, and the shorter time available both for the preparation and hearing of arguments, necessarily render its decisions of less weight than those of the full Bench in Edinburgh, and it would be a misfortune if cases either of great importance or of great difficulty were submitted to its decision.

We advocate its retention as the Court of Appeal in cases under £25 in value, not as deeming it the best possible Court, but as the

* See paper by Mr H. Johnstone, Advocate, in "Transactions of Law Amendment Society, 1868-69," p. 62.

† Excessive printing is an inveterate and deeply rooted evil in Scotch procedure. The days, however, when the Scotch lawyer "wrote all he spoke, and printed all he wrote," are fortunately over.

best which is, from the nature of these cases, likely to be generally available to the suitors. On the other hand, it is, we think, not true that the time of the full Bench is improperly occupied with appeals. From the wide extent of the Sheriffs' jurisdiction, questions of great nicety in almost all branches of the law constantly occur in them; even when they turn wholly on evidence, there are few cases requiring more care from the experienced Judge than resolving the conflict of evidence, where a serious conflict exists. If there be no conflict, a case of this nature is shortly disposed of,—usually by hearing only one counsel for the appellant.

An incidental point remains to be considered. A claim has been put forward by some Sheriff Court practitioners that they should be permitted to plead in appeals from the Sheriff Courts, and that the privilege of counsel should be abolished. Whether this claim should be granted must depend on whether it is best for the interests of the public that the distinction between the professions of counsel and agent should continue. We shall not here discuss this point generally, but solely with reference to that class of cases this paper has had in view—appeals in causes of small value from the Sheriff to the Supreme Court at Circuit. It is in regard to these that the arguments of the procurators (for, though urged in the interest of their clients, it is by a few energetic and able procurators alone that they have been urged) have most weight, and they appear to us to deserve attentive consideration. It is said that it would be for the interests of the client that the person who has prepared and pleaded the case in the Inferior should conduct it in the Superior Court; that the Sheriff Court practitioner is always more experienced and often abler than the junior counsel who attend circuit, and that the case could be conducted by the former at less expense than by the latter. These arguments—and they are all we have heard in favour of this change—do not appear to us conclusive. When a case comes before an Appellate Court, what is wanted is that the points should be eliminated and presented to the Judge with the best legal skill available. The country practitioner, though he may be familiar with the details of the suit, does not, except in rare cases, possess this. He is often not much conversant with judicial procedure in the Sheriff Court, his business consisting chiefly in the management of property and conveyancing. With the procedure in the Supreme Court he is necessarily not familiar. In the larger towns, where certain members of the profession do devote themselves to Sheriff Court practice, they are yet inferior in the main to the bar of the Supreme Court. Neither their legal nor their general education has been so high, nor have they the advantage of observing the method of conducting business as practised by the best lawyers, and also (not, of course, without exception) they have chosen the inferior branch of the profession, because they have not felt themselves competent to the superior. It is true that, taking the average of the counsel who at present attend circuit, there will probably be in most country towns agents who have had more experience in

litigation, but that experience has been in work of a coarser kind. No doubt the class of counsel who at present attend circuit, and the shortness and irregularity of their attendance, afford the strongest ground for the procurators' claim. Should, however, the views* brought forward in another place receive effect, and substantial civil business in the shape of jury trials and proofs be conducted at circuit, the advantage in point of experience would no longer be on the side of the agent, for counsel of experience would, we see no reason to doubt, attend circuit as in England. There is a certain plausibility in saying, if the client is content to leave the case in the hands of the agent, why should he not be allowed to do so; but the decision of this question would, in a majority of cases, rest with the agent himself. As regards expense, unless the fee at present given to counsel for a circuit appeal were materially increased, which we see no reason for supposing it either would or should be, it is almost certain no Sheriff Court practitioner of experience or ability would conduct it for less. We think, therefore, no reason has been shown for making circuit appeals an exception to the rule that pleadings before the Supreme Court should be conducted by counsel only—a rule which is founded on the principle, that in law, as in other departments, the public is best served by a division of labour, and that excellence in the different part of legal business will be best obtained by a distinction of profession between the classes of lawyers by whom it is performed. It is with reluctance that we have touched on this point, but it was necessary to a complete consideration of the subject handled in this paper. Here, as in many more important particulars of legal reform, the want of an intelligent and unbiassed public opinion is felt.

The argument in favour of making the Scotch Circuit a real, instead of a nominal, Court for civil business may be thus summed up:—

I. The Scotch circuit at present is conducted at considerable expense and (except in Glasgow) with small utility. †

II. It contains the elements of a Court of considerable utility, for it brings the best Judges to the districts where parties and witnesses reside, and where proofs in disputed questions of fact are prepared, though at present they are led in Edinburgh.

III. It would be attended by experienced counsel, if there were substantial business to be done.

IV. It has been proved by experience in criminal cases in Scotland, and in civil as well as criminal in England, to be a satisfactory Court for taking proof, which is a kind of business both admitting and requiring despatch, whereas the formation of a sound judgment in law requires deliberation.

* See Transactions of Law Amendment Society, 1868-9, p. 52, on the Expediency of Trying Disputed Questions of Fact in Civil Cases at Circuit.

† Without going the length of the writer of paper read before the Law Amendment Society, already referred to, who called the Scotch Circuit "*a hollow farce*," or of a member of the Royal Commission, and experienced Procurator-Fiscal, Mr Boyd Baxter, who styled it "*a skeleton*," the expression in the text will, we think, be admitted by most persons who have attended circuit in recent years, accurately to describe the present state of the Scotch circuit.

V. Although circuit has never been tried either here or in England to any considerable extent as an Appellate Court, and from its nature could not be made a good general Court of Appeal, it would afford, for cases of small value, an opportunity of cheap appeal which would not otherwise be available, and the exclusion of which by the existing law leads to injustice.

VI. The changes in the existing law requisite to make it a working Court for civil business would not be great. *

The conclusion we deduce from these propositions is that the experiment deserves to be tried by the legal profession, which has a good deal in its power under the existing law, facilitated by the legislature making such changes in the law as are requisite to give a Civil Circuit a fair trial, and supported by the public. Æ M.

Correspondence.

THE INFERIOR JUDGE AND HIS CRITICS.

SIR,—There is a story of a soldier undergoing punishment who cried out that the strokes fell sometimes too high and sometimes too low; so that, as his executioners complained, “there was really no pleasing the man.” An author replying to his critics may be likened to that sufferer at the halberds. Whether you hit him high or hit him low, you still find him hard to please.

I cannot, at all events, complain of severe usage at the hands of the conductors of this Journal, in which I am permitted, once more, to make myself heard. And certainly I should not have sought the opportunity so courteously given, but for my strong conviction of the important public interest expressed in the title of my pamphlet “The Inferior Judge”; an interest certain to make itself heard, in the long run, above the cry of personal interests and professional prejudices in conflict around it.

Probably I should have escaped one criticism here made† had a sentence at the foot of page 71 of my pamphlet been written thus:—

“On questions of fact an appeal from the Judge who has seen the witnesses to a Judge who has not seen them is, *in many cases*, an appeal from the Judge better informed to the Judge less informed.”

The words italicised above were not inserted, because, when writing this passage, I steadily kept in view the general rule of law requiring the Judge, or jury, who decides upon evidence, to see the witnesses by whom that evidence is given. That rule assumes that a Judge, or jury, who sees the witnesses is better informed than a Judge, or jury, who does not.

A case may, no doubt, be supposed from which the elements of doubtful credibility and undue bias are altogether eliminated; the recorded evidence presenting merely a document for construction. In such a case the appeal Judge would retain unimpaired the manifest advantage of coming second to the consideration of the cause. Such a case may be supposed for the purpose of

* So far as these relate to Appeal, they have been pointed out in the present paper; and with regard to Proofs, in a former paper. See Journal of Jurisprudence, xiii., p. 667.

† “We observe that Mr Hallard believes in the very questionable argument that ‘on questions of fact, appeals from a Judge who has seen the witnesses to a Judge who has not seen them, are appeals from the Judge better informed to the Judge less informed,’ and therefore ought to be abolished.”—*Journal of Jurisprudence* for July last, p. 389.

argument; for practical purposes it may be safely laid aside. It is, in practice, unknown. The elements of bias and credibility are an infinitely variable quantity; they are sufficiently present in all cases to justify the wisdom of the rule above referred to. It is, nevertheless, quite true that the inductive element—the matter of inference in law and in fact—often prevails sufficiently to give the second Judge, both being assumed equal in ability, a considerable advantage over the first. Even in cases in which the elements of credibility and bias are of the highest consequence, the second Judge, though not so well informed as the first, may make better use of his less perfect information. In criminal causes, for instance, in which an intelligent public sees not the witnesses, but reads the newspapers, the public verdict may be sounder than the quite opposite verdict returned by the jury, in whose personal presence the whole judicial procedure was transacted.

Do not, therefore, let it be assumed that I am against appeals on questions of fact. The first Judge may have gone wrong on a question of inference, wrong by taking one part of the evidence with or without another. That error may manifestly be set right without a new trial. He may have been misled by false evidence. Here a new trial is necessary. It is for the Appeal Court to say, after such preliminary inquiry as they may judge necessary, whether the case is one for the more sweeping remedy, and to what extent it should be granted. A very limited issue for new or additional trial may be all that is necessary to set the doubtful matter right. Where the evidence is not recorded either directly or indirectly in the judgment under appeal, a new trial seems the only way of appeal on fact.

But neither here nor in my pamphlet do I profess to exhaust this difficult and interesting question. My present purpose is merely to protest against an inference from a passage in my writing. I had these pointed out in passing a frequent and acknowledged difficulty which besets the "cheap appeal" of our Sheriff Court system. But it is no dogma of mine that a judgment on fact should be final.

The criticism which I am now answering, kindly and courteous as I acknowledge it to be, raises the question of personal dignity as involved in some of my statements. I must not shirk this point; it admits of a simple and brief explanation.

It was a part, an essential part, of my case to state fully the disadvantages of a Sheriff-Substitute's position. Mark that I call them disadvantages; I do not call them "wrongs" or "grievances." Considered in the latter aspect, they suggest an answer which I have stated as clearly and forcibly as I could. But I had at heart to shew, in sharp contrast, the importance of a Sheriff-Substitute's duties, and the exiguity of his social and professional position as the result of these disadvantages. In that view, as discouraging able men to be candidates for an important public office, these disadvantages are nothing less than a public evil. It was my part, therefore, not to leave any one of them unstated. It was my duty to state none of them with exaggeration. I have endeavoured to fulfil my part without falling into that error.

I propose, in a subsequent paper, to meet some of the other criticisms with which I have been honoured.

FREDERICK HALLARD.

The Month.

The Court of Session and the Vacant Judgeship.—When the Court met after the Christmas recess, not only was the seat of Lord Manor still vacant, but Lord Deas and Lord Barcaple were both absent from illness, a striking commentary on Mr Gladstone's idea

that this department of the state, which necessarily consists of elderly men, can safely be reduced to the lowest possible number, so as to leave no provision for contingencies. As our description might be thought to be coloured by professional indignation at an illiberal Government, we copy the picture of an impartial eye-witness in the *Scotsman*, a journal not too friendly to our legal institutions:—

"The impaired and disordered condition of the Court was the subject of general observation. The Outer House was represented only by Lord Jervis-woode. Lord Barcaple is ill from overwork, and has applied for a long leave of absence; Lord Ormidale was engaged in trying with a jury a case which would have fallen to be disposed of by the late Lord Manor, whose chair has not been filled by Government; and it was Lord Mure's "blank day," employed in the work which Judges necessarily have to do out of Court. In the First Division, Lord Deas was absent from serious illness, one result being the postponement of a proof which his Lordship had been appointed to take. The amount of work thrown on Lord Ormidale was impracticably great. He had a jury trial which, beginning on Monday, lasted over a great portion of yesterday; he had yesterday afternoon to commence a proof in the heavy case of *Ellis v. Ellis*, which had been transferred to him from the vacant Judgeship; he is Bill Chamber Judge, the duties of which functionary, according to the recent report of the Faculty of Advocates, take up at least two hours a day; he has his own roll, not yet begun with; and Friday is his blank day, when he is required elsewhere than in Court. Under these circumstances, there is a very strong opinion abroad that, whatever question may be raised as to a reorganization of the Court, a very great mistake has been committed in throwing the present organization out of gear by leaving a Judgeship unfilled."

In such circumstances, it is not surprising that the Government should have repented of its hasty and ill-judged resolution; and, we believe, no appointment could have given more satisfaction than that which has been so tardily made. In Mr Gifford the Government found one absolutely free from every objection, a man of the widest experience, the greatest power of work, the fullest and readiest knowledge of the law, the quickest and soundest intellect, and the most unvarying courtesy.

It might, perhaps, have seemed better to reserve such a man for an official career, for which, after the present Crown officers, there is just at this moment so great a lack of fit candidates on the Liberal side of the profession. But there may be, indeed, we hope there will be, a long time to wait for any vacancy of that kind; and it was on the whole, we think, wise in the Government to appoint at such a time the man against whom no one could hint a word of depreciation. It is seldom given to a man, especially when he has great ability and has had great success, to be so entirely without enemies or detractors as Mr Gifford. His elevation, indeed, will hardly be grudged, even by those who we confess had as strong claims to promotion.

The Government of Scotland.—As Mr Crawford and Mr Baxter have both been wounded in the house of their friends, and their fitness for the proposed office of Secretary for Scotland denied by implication by the Town Councils elected by their own constituents, it may be hoped

that the agitation for the establishment of a new situation for which "no Edinburgh lawyers need apply," is nearly at an end. We believe that the report of the Commission sent down by the Treasury will be entirely in favour of the economy and efficiency of the present system of administration in Scotland, so that little or no money will be obtained by the destruction of the Scotch Boards, for the endowment of a Scotch Secretary. And, if the movement survives the loss of the capital that should have been furnished by that inquiry, and the exposure of the fabulous assertions of its leaders in which the inquiry will result, it will certainly receive its *coup de grace* if any of its supporters have the hardihood to bring the question before Parliament. If the fate of the similar proposal made in 1858, and Mr Baxter's ignominious discomfiture by Lord Advocate Inglis, had been remembered as they ought to have been, we venture to think that the question would never have reached its late dimensions, and that perhaps Mr Baxter would never have held an important office under a government which derives so much of its strength from Scotland. We hope that not only the lawyers of Dundee and Ayr, but all in those important places who value the interests and the honour of Scotland, will look well after Mr Baxter and Mr Crawford at next election. As for Edinburgh gentlemen who have been trying "to bite off their nose to spite their face," we hope that they now know how the majority of their townsmen characterize their policy, and that they already repent.

It is now, we believe, unnecessary for us to discuss this question fully. We have not altered the views which we deliberately expressed in May, 1867 (*ante* vol. xi., p. 257), and what we would have said now has been anticipated by two excellent articles in the *Spectator*. On Jan. 1, that Journal says:—

"To understand the present agitation for administrative reforms in Scotland two things must be kept in view. The agitation is not popular, but Parliamentary; did not begin with and is not carried on by the people, nor by their representatives in their interest. It is strictly a members' movement, directed against what is called 'the monopoly of the Administration' by the Scotch bar. Again, the object of the attack on the Boards and Government departments in Edinburgh is neither better nor more economical administration. The raid made on the Civil Service is an effort to discover duties and a salary for the Secretary for Scotch affairs—that is, to supersede the Lord Advocate. Not long since Mr Duncan M'Laren, M.P., who leads the attack, resented interference with the Edinburgh establishments as a violation of the rights of Scotland and the Act of Union. He now demands their wholesale reduction or abolition. In his case, it will be believed, the Scottish patriot has not been merged in the Imperial legislator. Mr M'Laren is merely pressing his point in favour of the Secretary project, regardless of consistency and what some may conceive to be his duty to his country.

"Of course, the motive to an act has little to do with its merits practically considered. There may be a good case for reform, although the reformers may be prompted to exertion more by personal than public considerations. Thus, though it is important to bear in mind the nature and objects of the agitation, we are not helped much by a knowledge of these in the decision of the question whether it is the public interest that the agitation should be successful. Before a decision on this point can be reached, there are two preliminary questions to be answered. Have the Scotch members a grievance that it would benefit the

public to remove? and if so, do they propose the best and cheapest remedy for the evil?

"The grievance is, that the Lord Advocateship is the sole great office of state connected with Scotland, and that it can be held only by a leading lawyer. The public interest is said to be involved in this way—that the Lord Advocate is an overworked official, who cannot perform his duties satisfactorily. The remedy suggested is the appointment of a Secretary for Scotch affairs, who shall be in Parliament, and shall relieve the Lord Advocate of his administrative duties, except in connection with criminal prosecutions and of his legislative duties, except such as naturally fall under the charge of an Attorney-General.

"The grievance turns on a very partial view of the State arrangements. The Lord Advocate is not the sole great official, since the Home Secretary is Secretary for Scotland as well as England and Ireland; and it is open to Scotch lay members to aspire to the seals of the Home Office. There are, moreover, two Under-Secretaryships for Home Affairs open to Scotch members if they can win them in the competition of Parliamentary life, besides usually a Scotch Lordship of the Treasury. Since there are thus three or four offices they may have, any of which would give the holder great influence in Scotch affairs, the grievance seems to be mainly sentimental. It involves, moreover, a miscalculation.

"It by no means follows that the office of Secretary would be monopolised by the Scotch members. Their failure, as a rule, to obtain the offices at present open makes against the supposition that it would, and we cannot imagine that they desire the affairs of their country to be specially entrusted to Irish or English hands, rather than leave them as they are. The affairs of Ireland, under an arrangement similar to that they are advocating, have frequently fallen to the hands of Englishmen and Scotchmen. As to the connection of the grievance with the public interest, it is not quite clear that the Lord Advocate fails satisfactorily to perform his functions. That the complaint has so often been made might be held to prove it well founded, were it not that it has been made only and always by the promoters of the Secretary project. Even the most captious of these ceased to complain during the Advocacy of Mr Gordon; and we have yet to learn that Mr Young will not give at least equal satisfaction. The truth is, as most people know, the complaints were almost personal to one who held the office so long that he might well think it existed for himself rather than for the country. Assuming, however, that there has been room for dissatisfaction with the manner in which the duties of the office have been performed, and that in the interest of the public this should be provided against in future, we arrive at the second of the preliminary questions, whether the proposals of the reformers are the cheapest and most effective means to the end in view that can be devised.

"The Lord Advocate is the public prosecutor in Scotland, and his special function is to preserve the peace of the country. The more serious indictments issue in his name, and the mode of trial of all criminal cases, except police cases, is prescribed by him, or by him through his subordinates. During his absence in Parliament he is relieved of these duties by the Solicitor-General. In Parliament he has the charge of such legislation, initiated by the Government, as affects Scotland; the greater part of it has for long been of the description of 'law' legislation, and nearly all of it such as an able lawyer must have been consulted in preparing. He is *ex officio* a member of one or two of the Edinburgh Boards, but they generally get on without him. He attends them only when specially called in. With the departments, excepting the Crown Office, he has almost no connection save in his character as a counsel; some of them correspond directly with the Home Office, and others with the Treasury. It is here we find the explanation of a confession the reformers are making—namely, that as matters are arranged, the duties performed by the Advocate which could be taken from him and given to a Secretary of Scotch affairs are quite insufficient to justify the appointment of so high an official. The Secretary would have a few bills to conduct through the Commons annually, and to receive a few deputations respecting them; beyond that he would be functionless. And hence also the inquiry that is being made into the public departments in Scotland. Duties

for a Secretary are sought in the boards and departments because they cannot be taken in sufficient numbers from the Advocate. He has not got them. More than one of the departments is at this moment without a head, the offices having fallen vacant and being left in suspense pending the inquiry. The suggestion is that a Secretary may be made to supersede the heads of departments. But nothing can be plainer than that this is an unworkable idea. The departments, even supposing them centralised in a secretarial office, must have heads of some sort, by whatever name they shall be called; and it is very clear that when the heads have been made as humble as it is possible for them to be, only a resident Secretary can properly control them, and that the humbler they are made the greater need there will be for control by a superior officer. It also seems clear, from the complexity of the various duties that officer would have to perform, that he must be a *permanent* official. The Secretary that the reformers desire to see appointed is to be in Parliament, non-resident, that is, from February to September; a political officer changing with the Government. It follows that a feature of the projects of the reformers must be the appointment of a permanent Under-Secretary resident in Edinburgh, in addition to the Secretary in Parliament. Brought thus to a practical test, the scheme is seen to involve a considerable increase of expenditure on the administration in Scotland—the payment of two Secretaries and of private Secretaries to both of them, and the establishment of secretarial offices both in London and Edinburgh—the Lord Advocate and Solicitor-General remaining as before. Indeed, only an extreme immodesty could suggest a reduction of the salaries of either of them.

The reformers are not stupid men, whatever else they may be. It must have been a perception of the expensiveness of their project that led them, while searching the departments for functions for the new officials, to propose the pillage of the Edinburgh Boards to furnish them with salaries. Could they take more funds from the Boards than they require for their scheme, the scheme, as a whole, might seem economical. This, however, we suspect, cannot be done. There is nothing exceptional about the Boards but the smallness of their cost. The finance accounts show that they cost much less proportionally than the corresponding Boards in England and Ireland. All such Boards may be too costly, it is true, and some of them may besides be objected to on principle. These general issues are not raised, however, except it may be as regards the Bible Board and the Fishery Board, which are objected to on principle, and, as we think, rightly. The abolition of the one would only save about £900 yearly; of the other, less than £3000, if we deduct from the whole charges those relating to piers and harbours and the cutter and boat service, and set off against the balance the fees for branding, which exceed £4000. The abolition of these two Boards is the utmost that can or should be looked for; and we do not see that the cost of the others, any more than the cost of the departments, can be reduced much. Take it that £4500 a year might be obtained by abolitions and reductions conjoined, would that suffice? It would not suffice, we imagine, to pay salaries to the Secretaries and their private secretaries, so that the cost of the two new offices in London and Edinburgh would be a fresh burden on the country. As they are moving in the name of retrenchment as well as of more efficient administration, they must make their case very plain at this point; that more shall not fall to be paid instead of less, for what after all is a very doubtful improvement in the Administration."

Proposed Changes at Aberdeen.—Amidst all the variety of opinion that exists as to the constitution of the Sheriff Courts, on two points most people whose opinion is of consequence are agreed. The one is, that there are too many Sheriff-Substitutes; and the other, that in some districts they are badly distributed. There are outlying regions beyond the limits of the railway system, in which it seems scarcely possible to hope for any better arrangement than that which exists at

present. There cannot be very much work for the Judge resident at Tobermory or Stornoway; but then there must be some sort of Stipendiary Magistrate for Mull and the Lewis, if it be only to dispense justice in criminal and small debt cases. It is plainly right, however, that the number of local Judges whose time is not filled up by their judicial duties, should be reduced as far as possible. Wherever the facilities of transport and communication afforded by railways are to be found, districts should be assigned to the Sheriffs-Substitute, sufficiently large to secure that the country shall have the benefit of their whole time, and that they shall not suffer from the evils of enforced idleness. There are three important advantages which, it is at once apparent, must attend such an arrangement:—(1.) Uniformity throughout a large district in the administration of criminal justice, and in the discharge of those magisterial functions which are imposed on Sheriffs-Substitute. (2.) Increased mental activity, and freedom from crotchety and “smallness” of all sorts, the too common offspring of little work, done in a little place; and (3) the best and most experienced men at the bar will aspire to the office when associated with numerous and important duties, and when a reduction in the numbers of those who at present hold it, will enable Government to offer a remuneration suitable to its duties and responsibilities.

An excellent opportunity seems about to be afforded for making, in one important district, such an arrangement as that which we desiderate. It may be assumed that no separate appointment is hereafter to be made to the office of Sheriff of Kincardineshire, and that so soon as legislative sanction can be got, that Sherifdom will be united to Aberdeenshire. Such a change is in the right direction, and is perfectly unobjectionable for all concerned. But we have also reason to understand that the esteemed Sheriff-Substitute at Peterhead, Mr Skelton, is, after nearly thirty years' tenure of the office, about to retire. That being so, there would remain as the judicial staff for the two counties of Aberdeen and Kincardine, a Sheriff, a Sheriff-Substitute resident at Aberdeen, and another at Stonehaven. The whole district is intersected by railways, and communication from Aberdeen to any part of it is rapid and easy. The population of the district at present assigned to the Sheriff-Substitute of Aberdeen, including the city of Aberdeen, is about 180,000. The district assigned to the Sheriff-Substitute at Peterhead contains a population of less than 50,000. The population of Kincardineshire is less than 35,000. Up to this time, therefore, two Sheriff's-Substitute have been employed in looking after less than 85,000 people, while one has been sufficient for 180,000, the latter including in his territory the large mercantile community of Aberdeen. Again, according to the returns for 1863 (the latest available), while the amount sued for in actions of debt in the Court of Aberdeen was £26,000, that sued for at Peterhead was £10,000, and at Stonehaven £3,700. Surely these facts strongly suggest a re-distribution of the business of the district, and not less plainly do they point to the discontinuance of, at least, one of three

Sheriffs-Substitute, the seats of whose Courts are within so short a distance the one of the other. The Sheriff-Substitute at Aberdeen does not seem to think himself overwhelmed by his present duties; on the contrary, we observe that both he and the Sheriff-Principal of the county have stated to the Law Courts Commission, that a large additional district might be assigned to the Aberdeen Court. However that may be, there seems to be now an opportunity for re-adjusting the judicial arrangements of an important part of the country. There can be no doubt that two Sheriffs-Substitute are amply sufficient for the whole of the two counties. It is to be hoped that if legislative interference be necessary to effect the change, the opportunity to be afforded by the passing of an Act for the union of the counties under one Sheriff-Principal, may be taken advantage of, so that it may contain clauses providing for the re-distribution of the work of the Sheriffs-Substitute in the way which we have indicated.

Procedure in the Sheriff Courts.—The Supreme Court is acting strictly within its proper functions, and is exercising them in a beneficial and praiseworthy manner, when it animadverts upon irregularities of procedure in the Inferior Courts. It is undoubtedly the duty of the Court of Session to point out and to censure any failure to comply with the statutory rules of procedure in the Sheriff Courts. It is a duty, however, which the boldest depreciator of the Court of Session cannot say that it has ever failed to discharge. It may, or may not, be chargeable with delay in the conduct of its causes, with allowing unnecessary expenses to be incurred, with many other faults, which the House of Lords from above, and the "Glasgow Bar" from below, have been quick to discover, and eager to reprehend; but no unprejudiced observer can justly say that our Supreme Judges, whether sitting in the Civil or the Criminal Court, have ever let an opportunity pass of keeping things right in the Sheriff Courts, or have been deterred by any false delicacy from using very plain language when they thought an error had been committed, or an irregular practice adopted. No one ought to complain of this. No one does complain of it, so long as the fault-finding is just, and the rebuke is administered with discretion and courtesy. But there is room for serious regret if observations be made from the bench of the Supreme Court condemning procedure in an Inferior Court, when the blame imputed is not clearly well merited.

We find occasion for these observations in a report in the *Scotsman* of an appeal from a Sheriff Court, according to which the Lord Justice-Clerk considered it his duty to bring a certain matter in connection with the case under the notice of the Court. The action was raised so far back as May, 1865, and final decree, which appears to have passed by default, was not given till late in 1869. During that time seven revivals of the action had been granted *of consent of the parties*. "Now, he need hardly say," the report bears, "that this was a very scandalous state of matters. The provisions of the Sheriff Court Act had been set at defiance. The 15th section of the Statute

authorised the revival of actions within a certain time upon 'good cause to the satisfaction of the Sheriff' being shown, why no procedure had taken place therein. Here it was perfectly evident that no cause at all had been shown, but that the matter had simply been one of arrangement between the parties, or the agents of the parties."

Was his Lordship quite justified in saying that this was a scandalous state of matters, or that the provisions of the statute "had been set at defiance?" The words sound strangely in the mouth of so conscientious a Judge and so courteous a man. The language is strong, the quarter whence it comes lends it additional weight, and it seems to have been used *ex proprio motu*, as the point was not raised from the bar.

Most of our readers are familiar with the provision of the Sheriff Court Act to which the Lord Justice-Clerk referred. It is in these terms: "Where in any cause neither of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein, the action shall, at the expiration of that period, *eo ipso*, stand dismissed, without prejudice nevertheless to either of the parties, within three months after the expiration of such first period of three months, but not thereafter, to revive the said action, on showing good cause to the satisfaction of the Sheriff why no procedure had taken place therein, or upon payment to the other party of the preceding expenses incurred in the cause, whereupon such action shall be revived and proceeded with in ordinary form."

The meaning and scope of this section have been more than once under the consideration of the Court, and from some of its ambiguous expressions all doubt has been removed by express decisions. For example, it is settled (*Stewart v. Grant*, 5 M'Ph. 737) that the lodging of a pleading, the making of a motion, even the appearance of a cause in the roll-book of the Court, is a "proceeding" which saves the cause from the statutory dismissal. It is plain, therefore, that the section in question does not necessarily ensure the speedy termination of Sheriff Court actions. If either of the parties shall, once in three months, enrol and move in the cause, although it be only to have the previous order renewed, it may remain in Court for an indefinite number of years. Further, even when the three months have elapsed without any proceeding being taken, it is in the power of either of the parties to have it revived, as *matter of right*, on payment of the expenses which have been incurred. Over this the Sheriff has no control. Nor does it appear that there is anything to prevent the action from being revived in this way any number of times. This has not, so far as we know, been expressly decided. But the only expression in the Act which can be supposed to lead to an opposite construction, seems to be "such *first* period of three months, but not thereafter;" in which clause the word "first" seems plainly to refer to the first three of the six months, after the elapse of which the process cannot be revived; that repeated revivals are competent seems to have been assumed by the Judges in the case of *Stewart*, above cited. Vide Lord Cowan's remarks.

The only other mode of saving the dismissal of the action is by showing good cause, to the satisfaction of the Sheriff, why no procedure has taken place. In the case which has led us to make these observations, the only "cause shown," seems to have been the consent of the parties. The Lord Justice-Clerk says that this is "scandalous," and that the provisions of the statute have been "set at defiance." Is it really so?

The statute leaves the revival of the cause in the discretion of the Sheriff, before whom the motion is made, and his judgment is not reviewable. "I think the revival of the cause is not a matter within the discretion of this Court. Such an interlocutor of a Sheriff-Substitute is not of a kind which can be appealed." Per Lord President in *M'Douall v. Brown*, July 13, 1865. If, therefore, the consent of the parties is "good cause to the satisfaction of the Sheriff," the statute does not empower any Court of review to give effect to an opposite opinion. All that the Sheriff has to do, is to apply his mind to the matter, and pronounce judgment. It may be "scandalous" that the Sheriff should pay any heed to the agents of both parties to a cause; but the origin of the "scandal" lies in the power conferred on him by the Act of Parliament, and his conduct cannot be said to be "in defiance" of its provisions. With the policy of the provision we have at present nothing to do.

But is there truly any good ground for maintaining that "consent of parties" ought not in most cases to satisfy the Sheriff that it is his duty to revive? Supreme Court Judges have already intimated very distinctly their opinion on the point. "The *ipso facto* dismissal of an action without any interlocutor is a novelty and an anomaly in the law. I think, therefore, we must not press a clause of this kind farther than the words require. It is no doubt desirable to encourage dispatch in litigation; but there may be cases in which reasons, that cannot well be avoided, may make some delay expedient and prudent. Within the six months, I conceive, there is only a contingent dismissal of the action, which is not final. It is in the discretion of the Judge to revive the action. It is obvious that in many cases both parties may suffer, if the action is not revived after the lapse of the three months."—Lord Neaves in *Mackintosh*, November 10, 1863. "I think that it was the intention of the legislature, by the 15th section of the Sheriff Court Act, to prevent parties from proceeding with a cause in which there had been three months' delay, except on payment of a penalty, unless they satisfied the Sheriff that there had been sufficient cause for that delay. But I think that the Act is not happily expressed for the attainment of that end. I think that the Sheriff has power, on the express consent of both parties, to revive the action after the lapse of the three months, and before the lapse of six."—Lord Benholme, *eodem loco*. "It is much to be regretted that the Act should allow an action to be kept up as in this case, for a period of three years, without any procedure, and that the object of this enactment should then be capable of being defeated by the two

parties acting in concert. But we must take the Act as we find it. The enactment proceeds on the assumption of antagonism between the parties in regard to the revival. The condition of paying expenses is in favour of the opposite party. This being so, is it not in the power of the opposite party to dispense with the condition? I fear that question must be answered in the affirmative. I know no case in which a party may not dispense with a condition of payment of expenses to himself. I think, therefore, that when a party admits good cause, or dispenses with payment of expenses, it must be within the power of the "Sheriff to revive the action."—Lord Justice-Clerk Inglis, *Ibid.*

The same views are expressed, or assumed, in the more recent cases of Stewart, above cited, and of Gordon, May 29, 1869, in which the late Lord Justice-Clerk Patton, in delivering judgment of the same Division of the Court, said: "Your Lordships, in the case of Mackintosh, have held that a consent to a motion to revive implies a waiver of the claim of expenses, and that upon such consent being given, the action may be revived."

After the above expressions of opinion by the Second Division it is not a little startling to turn to the language of the esteemed Judge who now presides there, as reported in the case which has led to these remarks. It is possible that the terms of the report are not quite correct. But if they are, we humbly think that, however wrong the delay which is complained of may have been, however unfortunate that so great delay should be possible in any case, it is difficult to justify the expressions that the "state of matters" was "very scandalous," or that "the provisions of the Sheriff Court Act had been set at defiance."

A Remarkable Conversion.—The *Pall Mall Gazette*, which called so fiercely last winter for a Scotch Secretary, now explains that all it wants is the abolition of one or two unimportant Boards, and the appointment of an efficient and well-paid Secretary to the Lord Advocate. We regret that we have no space this month to point out the lessons which this change of conviction appears to us to teach.

Why does the Court of Session not reform itself?—The following letter seems to us to require an answer to this question, and it is one of such importance that we give our correspondent the greatest possible prominence. All who have any knowledge of the evils he complains of, must agree in his observations. We may have to return to the subject, if no change takes place; and in doing so we shall point out, so far as we can, the facility with which a reform might be effected, and shall show not only who suffer by the existing evils, but also who gain by them:—

Sir,—If I had my way, we should have two sets of Courts in Scotland—first, the Court of Session and Circuit Courts of its Judges; and, second, Local Courts to consist only of a single Judge in each district. To the former the task of maturing and developing the law in all its branches should belong, and it should also be the Court of first instance in all cases of importance, though involving mere questions of fact. The Local Courts should be Summary and Popular Courts, final in questions of fact up to a limited value, say £100, but subject always to an appeal in law upon a special case. Despatch and cheapness

would be earnestly sought in a reformed Supreme Court, but subordinate to thoroughness and deliberation. In the reformed Local Courts, on the other hand, forms would be cut down to the small debt standard, and anything would be preferred to expense and delay. In short, a Supreme Court as deliberate as is consistent with business, Local Courts as summary as is consistent with due care, would provide the country with a complete judicial system, comprising Courts each the best of its kind.

Whether these views are accepted or not all will agree that needless hindrances, in time or money, to the progress of business in the Supreme Court should be firmly put down. I am concerned at present only with some points of practice under the late Court of Session Act, in which, as it appears to me, the forms of procedure conduce only to expense and delay, and not to thoroughness or deliberation. I refer, in particular, to the Summary Debate Roll in the Outer House, and to the dismissal of appeals if not timeously prosecuted.

The peremptory rapidity with which records are now closed is excellent; but, unfortunately, it is held to be an absolute rule that every case in which the parties do not renounce probation must go to the Summary Debate Roll. This is done even where the parties are agreed to take an order for proofs. Then, according to purists, issues must be lodged though the case be one which will never go before a jury. And, after all, the case is relegated to a Summary Debate Roll containing, before a popular Lord Ordinary, perhaps fifty other cases. When a case so situated shall be heard, depends on various contingencies—the engagements of the Lord Ordinary or of some much employed counsel. It is a fact that a case may remain months in this limbo without a step being taken.

Then, as regards appeals, it is obvious that many are now taken for the mere sake of delay. The inducements offered to such vicious litigation are by no means trifling. The appellant often exhausting the twenty days from the date of the inferior Court's judgment, gets his appeal sent to one of the Divisions. His opponent must wait eight days before he can get an order to print, and eight days farther must elapse in practice before he can move for dismissal. The cost of getting an appeal dismissed varies from £10 to £14, and this although there be no appearance for the appellant—the appeal being a sham from beginning to end.

The Court has the power to remedy these evils by Act of Sederunt. They have become apparent in the working of Mr Gordon's Act, and that Act confers upon the Judges an unusually ample discretion for removing needless and pernicious procedure. It would be easy to suggest practical remedies, but my purpose is merely to ask attention to the subject, in the hope that the Court may be moved to take immediate action in the matter. Heaven helps those who help themselves, and I for one believe that by the due exercise of the powers conferred by the late Court of Session Act the Supreme Court, as regards its internal arrangements, can be placed in a state of efficiency without waiting for the report of the Law Commission.—I am, Sir, your obedient Servant, C.

26th January, 1870.

Notes of Cases.

COURT OF SESSION.

(Reported by William Mackintosh, and G. F. Melville, Esquires, Advocates).

FIRST DIVISION.

THE LORDS OF HER MAJESTY'S TREASURY v. THE SOCIETY FOR THE CONVERSION OF ISRAEL.—Dec. 2.

Testament—Uncertain Bequests.—A testatrix had directed her executors to divide her estate equally among four charitable societies—the London Missionary Society, the British and Foreign Bible Society, the Home Missionary Society, and the Society for the Conversion of the Jews. There

was no question as to the validity of the bequests to the first three of these societies, who were English Societies. The fourth was claimed by the Scottish Society for the Conversion of Israel, but they were opposed by the Lords of the Treasury on the ground that there being no society bearing the name of the "Society for the Conversion of the Jews," the legacy was void from uncertainty and had lapsed, and the testatrix having left no relatives, the share of one-fourth of her estate had fallen to Her Majesty as *ultima hæres*. The Society for the Conversion of Israel had ceased to convert Jews in 1857, when they transferred their agencies to the mission of the United Presbyterian Church, and were at present mere collectors of funds for that mission, and did not come under the designation used by the testatrix.

The L. O. (Ormidale), after a proof, found that there was no society proved to exist under the exact name or designation of "The Society for the Conversion of the Jews," but that the claimants' society, "The Scottish Society for the Conversion of Israel," had existed for many years back, having offices and office-bearers in Glasgow, and that its exclusive object was the collection of funds to be applied for the conversion of the Jews: that the testatrix took an interest in that society in various ways. The L. O. sustained the claim for "The Society for the Conversion of Israel." The bequest was intended to favour some society which had for its object the conversion of the Jews, and the only society of that description known in Scotland is that which has been preferred; and this society was known to have been taken an interest in by the testatrix. It has no doubt been also proved that there is a London society having a similar object, but it did not appear that she took any interest in it, or even knew of its existence.

The Lords of the Treasury reclaimed, but the Court adhered.

Act.—Sol.-Gen., W. A. Brown. *Agent*—John Richardson, W.S.—*Alt.*—Paterson. *Agents*—J. & A. Peddie, W.S.

HOWAT'S TRUSTEES v. HOWAT AND OTHERS.—Dec. 10.

Trust Settlement—Vesting.—The late Robert Kirkpatrick Howat of Mabie, in Kirkcudbrightshire, died in 1863, leaving a trust disposition and settlement, by which he directed the whole of his unentailed estates and moveable property to be divided equally among his four younger children at the expiry of twelve months after his decease, or so soon thereafter as his trustees could realise said estates, and upon the youngest child attaining twenty-one years of age. They all attained majority, and survived their father, but one of them, Alexander, died without issue, but leaving a will, before the trustees were able to dispose of the heritable properties, and these were not sold till 1866 or 1867. The question was, whether any share of the succession vested in Alexander was transmissible to his personal representatives.

The L.O. (the late Lord Manor) found that no share of the residue had vested in Alexander at his death, in respect that that event happened before the period of division. He held that survivance of the period of distribution was made an essential condition of the vesting of any right in the several beneficiaries; because if it were not so, the institution of survivors, or destination over, which was expressly adapted to that event, and made referable to it, could have had no effect or meaning whatever. The judicial factor on the estate of Alexander reclaimed, and the Court affirmed. Lord Deas, who dissented, held that the words of the trust-deed might be construed

to mean that the distribution was to be made twelve months after the death of the truster, or as soon after his death as the estate could be realised. The deed plainly meant that the trust should be wound up as soon as possible. It would not be right that the trustees should have it in their power to change the destination made by the truster by delaying to realise the estate, and therefore the term of vesting should be at the time when the distribution should have taken place.

Act.—*Millar, Blair.* *Agents*—*Hunter, Blair, & Cowan, W.S.*—*Alt.*—*Pattison, Lea, Johnston.* *Agents*—*J. M'Cracken, S.S.C., Mackenzie & Kermack, W.S., John Galletly, S.S.C.*

DUNDEE CALENDERING CO. v. DUFF'S TR.—Dec. 16.

Back-Bond—Assignment.—Special case to determine the validity of the title offered by the seller of a tenement in Dundee, purchased by the Dundee Calendering Co. for £2200. The property, which was held burgage, belonged to John Nicol, who in 1824, by a disposition recorded in Burgh Court books, conveyed it to William Howe. The disposition contained a procuratory of resignation, which was not, however, executed by Howe, and so no title in his favour appeared in the Register of Sasines. He created a security over the property in favour of Ferguson's trustees by means of a disposition and assignation *ex facie* absolute and a back-bond. Ferguson's trustees were infeft on the procuratory of resignation contained in the disposition by Nicol, but no reference to the back-bond was contained in the instrument of sasine, which was an absolute infeftment in favour of Ferguson's trs. Robert Duff was now in right of Ferguson's trs. William Howe, by assignation dated 5th June, 1838, assigned to John Duff his right of redemption contained in the back-bond, and Robert Duff was John Duff's trustee. The question was, whether William Howe's right of reversion under the back-bond was effectually transmitted by him to the late John Duff by the assignation.

Held, that the Calendering Co. were bound to accept of the title offered to them. The right which remained in Howe after the disposition to Ferguson's trustees, was merely a personal right, which might be transmitted by assignation, and had been properly transmitted to John Duff.

Lord Deas, who differed, held that the question of title was one which the purchaser might try. The disposition by Howe to Ferguson's trustees was qualified by the back-bond, and might amount only to a security. There would be nothing to prevent Howe from taking infeftment if his disposition was merely in security, and the purchasers were asked to take an assignation instead of a disposition. These were matters which could not be determined, as it might involve the rights of those who were not parties to the special case—in which the Court had no power to call other parties interested as they might do in an ordinary action.

Act.—*Deanus, Marshall.* *Agent*—*William Archibald, S.S.C.*—*Alt.*—*Shand.* *Agent*—*Henry Buchan, S.S.C.*

CHRISTIE v. M'DONALD.—Dec. 17.

Entail—Lease.—Brathwaite Christie, Esq. of Baberton, sought to reduce leases granted by Alexander Christie, the late heir of entail, of certain parks near Baberton, which had formerly been let to a tenant for £130, the landlord having accepted a renunciation of the current lease, and let them to defr. on nineteen years' lease for £90.

After a proof, as to the value of the ground, the L. O. (Barcaple) found that the lands had not been let at a fair rent, and reduced the leases.

Pursuer reclaimed, and the Court affirmed, holding that the leases could not be allowed to stand against the heir since the rent was not a fair rent for the lands. The acceptance of the renunciation of his lease by the former tenant was a suspicious circumstance, as it had not been shown that he was unable to pay the rent stipulated, or that he was insolvent. If the late Mr Christie had thought the rent too high, he could easily have allowed the tenant an abatement of his rent, and this would not have prejudiced the rights of the present heir of entail.

Act.—Decanus, Mackenzie. Agent—Thomas Sprot, W.S.—Alt.—Advocatus, Macdonald. Agents—Ferguson & Junner, W.S.

CAMPBELL v. DUKE OF ATHOLL—Dec. 17.

Pontage—Statute—Dunkeld Bridge.—This action was brought to try the right of the Duke of Atholl to levy tolls on the Dunkeld Bridge, which was built in terms of powers conferred on the late John, Duke of Atholl, by the Act 43 George III., cap. 33. The L. O. (Manor), after a remit to an accountant to inquire into the state of the accounts, found that the Duke of Atholl was entitled to levy the tolls and pontages imposed by the Act, and to apply them to the expenses of the bridge, until the whole expenses of building the bridge and making the roads and procuring the Act, with legal interest, should be paid, and till a fund of £15,000 should be constituted for maintaining and supporting the bridge; that s. 9 of the Act, which referred to the keeping of accounts of the bridge expenses, was merely directory, and that the failure of the Duke to lodge exact states of accounts did not draw after it the penal consequences of forfeiting the right to tolls and pontage duties collected at the bridge; and that, as respects the late Duke of Atholl's contract in 1807 with the Commissioners of Roads and Bridges, the Duke was not bound to restrict his charge for the completion of the bridge to the sum of £14,770 19s 11d, under deduction of £6,917 19s 9d.

Pursuers reclaimed.

Held, that defr. was entitled to levy and collect the toll or pontage authorised to be levied at Dunkeld Bridge, and to apply the same to the purpose of defraying the expense of and connected with the building of the bridge, and making roads of access thereto until the whole of such expense, with interest thereof at 5 per cent., shall be paid off, but with this qualification, that from the total amount of such expense must be deducted the sum of £6685 advanced by the Commissioners of Highland Roads and Bridges with corresponding interest, and that the amount of such expense to be charged against the tolls, after deducting said sum of £6685, shall not exceed the sum of £18,000, with interest as aforesaid; that defr. was not precluded by anything contained in the contract between the Commissioners of Highland Roads and Bridges and the Duke of Atholl, dated 14th Jan., 1807, from charging against the tolls the whole of the said sum of £18,000, if proved to be expended on the purposes foresaid; that the failure of defr. and his predecessors to lay accounts of the expenditure annually before the Justices of the Peace and Commissioners of Supply of the County of Perth does not deprive defr. of his rights to levy tolls at the said bridge, so long as any part of the expense of building the bridge and making the roads, with interest as aforesaid, and within the limit aforesaid, remain unpaid, reserving the question whether the expense of procuring the Act is to be

included in the said sum of £18,000, or is to be charged against the income arising from the tolls as soon as the bridge was opened for traffic, reserving also the question of expenses."

Act.—*Mackenzie, Scott.* *Agents*—*Wotherspoon & Mack, S.S.C.*—*Alt.*—*Sol.-Gen., Lee.* *Agents*—*Tods, Murray, & Jamieson, W.S.*

MORRISON v. DOBSON.—*Dec. 17.*

Marriage—Promise Subsequente Copula—Per verba de presenti.—Declarator of marriage by Mrs Isabella Morrison, Leith Walk, against Thomas Dobson, supervisor, Inland Revenue, Leith. The L. O. (Jerviswoode), after proof, found (1) as matter of fact, that the pursuer and defender did, on or about 5th July, 1864, within the house, No. 3 King's Place, Leith Walk, mutually promise and engage to marry each other; and that, on the faith of that promise and engagement, pursuer thereafter consented to and had carnal connection with the defender, within said house, on or about the said day; and (2), as a matter of law, that pursuer is the wife of defr., etc. Defr. reclaimed. When the case came before the Court, they ordered (10th June, 1869) the pursuer and defender to be examined as havers, with a view to the recovery of all letters passing between them, and all other documents pertinent to the cause. Under the commission and diligence, a great number of letters were recovered, chiefly from defr. to pursuer. *Held*, that pursuer had failed to instruct a marriage with defr. either *per verba de presenti*, or by *promise subsequente copula*. There was no express written promise prior to the connection; but the existence of a promise prior to the connection might be inferred from the whole course of defender's letters to pursuer; yet neither before nor after the connection was there any evidence of pursuer's willingness to have married defr. On the contrary, there was proof of her repugnance and aversion to such marriage; and proof that she denied that she was married, and acted as an unmarried woman. After the connection defr. held strongly and enthusiastically the notion that it was, in his estimate of its validity, equivalent to a private marriage; but during the whole period of upwards of two years, extending down till the beginning of September, 1868, the pursuer never responded to his expressions of attachment, or expressed a wish or willingness to marry him, and still less a belief that she was married. In these circumstances, the pursuer had not established a marriage between her and the defr. She did not mean or wish to marry defr., and she did not rely on his fulfilment of a promise to marry. At the time when she yielded her embraces she neither expected or desired the fulfilment of any such promise, and did not surrender her person on the faith of it.

Act.—*Sol.-Gen., Thoms.* *Agents*—*Lindsay & Paterson, W.S.*—*Alt.*—*Gifford, Trayner.* *Agent*—*P. S. Beveridge, S.S.C.*

GRIEVE v. CUNNINGHAM, &c.—*Dec. 17.*

Settlement—Request to Law-Agent.—The late Miss Margaret Grieve, who died on 8th Dec., 1868, by her settlement conveyed to defr., William Cunningham, writer, Coldstream, her whole heritable and moveable estate, subject to payment of two legacies of £50 and £20. The heir-at-law sought to reduce this settlement on the ground that Miss Grieve was not of sound mind when she executed it, and that it was procured from her by the fraud and circumvention of defr., who, being her agent, and having prepared the settlement in his own favour, and without giving the deceased the protection

and benefit of disinterested counsel and advice, should not be allowed to benefit by the deed.

After a proof, the L. O. (Barcaple) found that pursuer had failed to establish any sufficient ground in law for reducing the disposition and settlement. The testatrix laboured under cerebral disease, but it did not destroy or even impair her mental faculties, except on occasional temporary fits of wandering, and the settlement was the genuine act of the testatrix herself in accordance with her wish and intention previously expressed. With regard to the serious ground of challenge that defr. was the law-agent of the testatrix, the L. O. held that the presumption was against the deed. It could never be a proper course for a law-agent so to act, and it would always lie upon him to show that the making of the settlement in his favour was the free and uninfluenced act of the testatrix, deliberately entertained and carried through with an entire knowledge of its effect. But he had proved all this in the present case.

Pursuer reclaimed, and the Court adhered. *Held*, that although in all cases it was improper for a law-agent to prepare a will in his own favour, it did not follow, by the law of Scotland, that the will was null, although that had been the law of Rome. It had been proved that the testatrix had no near relations, and entertained a friendly regard for defr., and that she had expressed her intention of leaving her money to him, subject to some small legacies; and defr. had discharged the presumption of undue influence which lay on him.

Act—Advocatus, Mackenzie. Agents—Morton, Whitehead, & Greig, W.S.
—Alk.—Gifford, Watson. Agents—J. B. Douglas & Smith, W.S.

A. v. B.—Dec. 18.

Special Case—Agents.—In a special case by a widow, her children, and the trustees of her late husband, to determine the widow's rights under the settlement of her husband, the same agent was employed to act for all the parties. *Held*, that the pupil and his tutor were entitled to the benefit of a separate agent to act for them, and that the country agents being different was not enough. An opinion was indicated against the employment of only one agent in a special case.

SPECIAL CASE FOR LORD CLINTON, &c.—Dec. 18.

Courtesy—Entail—Feus.—Special case for Lord Clinton and Saye, and his eldest son the Hon. C. J. R. Trefusis, in order to determine the rights of Lord Clinton to courtesy out of the estates of the late Lady Clinton, who was the only daughter of the late Sir John H. S. Forbes. By trust-disposition Sir John Forbes conveyed to trustees his whole estates, heritable and moveable, and directed them to convey them to his daughter. The trustees proceeded to carry out the directions, and, at Lady Clinton's death, she was infeft in the entailed estates of Fettercairn and Invermay, in the superiority of feus of Greenhill and Morningside, and in a house in Perth, while the trustees were infeft in the fee-simple portions of the estates of Fettercairn and Invermay, and in the lands and barony of Pitsligo. The entail of Fettercairn contained a clause excluding the rights of the wives and husbands of the heirs of entail to terce or courtesy, but the entail of Invermay did not contain any such clause.

Held, that Lord Clinton was entitled to courtesy out of the entailed estate of Invermay, and also out of the feus and burgage tenement, but not

out of the entailed portions of Fettercairn, nor out of the fee-simple portions of Fettercairn and Invermay, and the lands and barony of Pitsligo, in which the trustees stood infeft at the time of Lady Clinton's death. The only question of difficulty was as to the courtesy payable out of the feus. That was a matter not of legal principle, but of arbitrary rule, and on a review of the authorities, it must be held to be settled in favour of Lord Clinton.

Adv.—Sol.-Gen. Agents—Mackenzie & Kermack, W.S.—Alt.—Fraser. Agents—Tods, Murray, & Jamieson, W.S.

LESLIE AND OTHERS v. STORIE AND OTHERS.—Dec. 18.

Parish—Manse—Repairs of.—The complainers, Colonel Leslie and Mr Gordon, are proprietors of three-fifths of the parish of Inch, Aberdeenshire. In 1860 the manse was repaired at a cost of £270. In 1868, after some procedure, the presbytery of Garioch found that the expense of the buildings and repairs on the manse, offices, etc., would amount in all to £702 3s, and that the heritors should be assessed accordingly. Complrs. sought to interdict the minister and the presbytery from carrying out this decision. The L. O. (Jerviswoode) remitted to Mr Kinnear, architect, who estimated the expense of putting the manse in repair at £180; but even then it would not be a suitable residence for the minister, inasmuch as the existing accommodation was insufficient as regards both its extent and character, and to make it suitable would require the expenditure of about £560.

The L. O. thereafter found that it was competent for the presbytery to decern for repairs on the manse and offices to the extent of putting the existing buildings in a proper state of repair, the probable expense of which was estimated at £180, and to that extent the suspension ought to be refused. While the manse and offices were constructed on a plan faulty and deficient in many respects, the buildings, as such, were in a condition capable of being put in a good state of repair at a cost of £180; that the alterations recommended with a view to the suitable accommodation of the minister could only be sanctioned as taking the place of a new manse; and the condition of the case related merely to the extent of repair to be carried out by order of the Presbytery.

The minister reclaimed, and the Court recalled and repelled the reasons of suspension.

Held, 1st, That the Court has not, in the case of the manse, applied the rigorous rule on which they have largely acted in the case of the church—viz, that they cannot order an enlargement unless repairs are necessary of such an extent as would cost nearly as much as the construction of a new church. 2d, That the fact of extensive repairs, though not rising to this magnitude, being necessary in order to make the manse habitable, is sufficient to let in consideration of the question whether additions, greater or smaller, should not at the same time be ordered. The necessity of structural renovation in one or other part of the building is naturally an important element, but not indispensable to admit the interposition of the Court, provided the repairs necessary are of a substantial and extensive description. The jurisdiction thus originated is necessarily of a discretionary character; but so, to a certain extent, is our whole jurisdiction in this matter. The principle was the ground of decision in the case of Kingoldrum, 24th Jan., 1863, and approved of in other cases. *Elliot v. Hunter*, 12th July, 1867, did not conflict with the others, because in that case the repairs necessary were estimated to cost only £17, and the case was therefore clearly outside the legal

category. In the present case the repairs necessary to make the manse habitual were extensive, including to some extent structural renovation. They were estimated to cost upwards of £200; and it was by no means to be left out of view that only about nine years ago repairs and alterations at the cost of £270 had been found necessary on this manse. The fact spoke volumes as to the character of the fabric, and it warranted the Court in stating, on the one side of the account, more than the mere amount of repairs falling to be laid out at the moment. Applying soundly the principle applicable to the case, the Court is entitled, in ordering repairs, to order additions also. In this way the main reason of suspension of the Presbytery's decree entirely fell to the ground. The residence of the minister of the parish should be suitable to his position, and comfortable for his family, not merely as a tribute due to a most valuable and useful class of men, but with reference also to those moral influences which are very closely connected with suitable and comfortable dwellings. The manse of the minister should be the dwelling-house of a gentleman. This is very properly attended to in the construction of new manses. But there are some old fabrics, like that in the present case, which, utterly unfit as they are for comfortable or even decent residence, have strongly built walls, and obstinately refuse to go into decay. These often resist successfully the judicial hand. It was fortunate if, when unable to order a new manse, the Court could authorise those additions and alterations which will to some lesser extent enable the old building to discharge its proper function, and exhibit its true character.

Act.—*Decanus, Shand.* *Agent*—*William Mitchell, S.S.C.*—*Alt.*—*Sol.-Gen., Birnie.* *Agent*—*John Robertson, jun., S.S.C.*

LLOYD'S EXECUTORS v. WRIGHT.—*Jan. 7.*

Principal and Agent—*Commission.*—Action by the executors of the late David Lloyd, wholesale grocer and tea-dealer, London, against Wright, who acted as his traveller from Nov., 1856 to May, 1859, calling him to account for his intromissions under deduction of commission. After proof the L. O. (Ormidale) found that (1) according to the agreement of parties, under which defr. acted for D. Lloyd & Co., he was to be entitled to a commission of 25 per cent. on the gross profits of all goods sold, the profit to be calculated with reference to the cost price or value of the goods to Lloyd & Co., when purchased by them, and not with reference to their price or value in the London market at the time when they were invoiced and sent to the defr. for sale by him; (2) that, in calculating the cost price, the brokerage and lot-money must be deducted; (3) that, in ascertaining the amount of gross profits, the bad debts arising on defr.'s sales were not to be deducted; and (4) that defr. fell to be debited with 10 per cent. on the balance of bad debts arising on his sales after deducting the sales thereon received by Lloyd & Co. The result was to bring out a sum of £189 14s due by defr. to pursuers.

Pursuers reclaimed, and the Court altered the first finding of the L. O., and held that, in striking the commission due to defr., the profit must be calculated with reference to the price at the time when samples were sent to defr. with instructions to sell, and that he was not to loose or gain by pursuer's speculations in the London market; that in the case of bad debts defr. must be debited with a per centage on the gross amount of the sales, without the deduction allowed by the L. O.; but that this must be so calcu-

lated that no more than the full price should be received by the pursuers; otherwise the judgment of the L. O. was affirmed.

Act—*N. C. Campbell, Black.* *Agent*—*W. B. Hay, S.S.C.*—*Alt.*—*Shand, Rutherford.* *Agents*—*Messrs Grant & Innes, W.S.*

GATHERER v. SIR A. P. G. CUMMING'S EXECUTORS.—*Jan. 11.*

Landlord and Tenant—Removal.—Pursuer was tenant of Muirton, on the estate of the late Sir A. P. G. Cumming, from Whitsunday, 1847. The lease expired at Whits., 1866. The tenant gave a letter of removal, in which he agreed that he should remove from the houses, grass and pasture lands, and land intended for fallow and green crop at Whits., and at the separation of the crop as to the land in grain crop. Pursuer maintained that he was entitled to possession of the barns and thrashing-mill house, and stack-yard, for harvesting the crop of 1866. This was refused by defrs., who employed tradesmen to remove a thrashing-mill belonging to pursuer. The action concluded for the value of the thrashing-mill, and damages for being deprived of the use of the barns and stack-yards.

The L. O. (Barcaple) after proof, found that pursuer had not proved any usage in respect of which he was entitled to have the thrashing-mill retained in its place in the barn after his removal at Whitsunday, that pursuer not having removed the thrashing-mill, though required to do so, the landlord was entitled to take it down and place it under cover in a shed on the farm, there to remain at the risk of pursuer; that it had not been proved that pursuer applied to the landlord for the use of the barn-yard or other ground for stacking his crop, or for the use of the barn, and therefore assoilized defrs.

Pursuer reclaimed, and the Court adhered. *Held*, that the possession of the tenant ceased at Whitsunday, though he was entitled to a limited possession for the purpose of separating the crops from the ground. The moment the crop was reaped and carried away, this limited right came to an end. According to the rule of law, the outgoing tenant could have no right to any buildings on the farm, and had failed to prove the custom which, he alleged, entitled him to retain possession against the landlord and incoming tenant.

SHOTTS IRON COMPANY v. TURNBULL, SALVESEN & Co., &c contra.—*Jan. 11.*

Court of Session Act 1868—Issue—Reclaiming Note—Amendment.—Conjoined actions, arising out of a contract entered into by Turnbull, Salvesen & Co., to receive certain quantities of Shotts Boghead gas-coal during 1866 and 1867. The case came before the Court upon a reclaiming-note by pursuer, against an interlocutor of the L. O. (Barcaple) approving of two issues, one for pursuer and the other for defr. The pursuer desired to have a larger sum of interest inserted in his issue than that concluded for in the summons, and asked leave to amend his summons so as to allow him to insert the larger sum of interest in the issue. Defr. maintained that under s. 29 of the Court of Session Act, it was not competent to allow any amendment by which the sum concluded for would be increased; that the issues could not be considered under the reclaiming-note, as s. 28 of that Act and s. 6 of the relative A. of S. made it no longer competent to bring the terms of an issue before the Court by reclaiming-note, but only by a motion to vary the terms of the issue. *Held*, that the reclaiming note was competent under the A. of S., as the reclaimer desired both to amend his summons and to alter the wording of the issue, a case not contemplated by

s. 6. An A. of S. was not to be strictly interpreted like an Act of Parliament, but must be so used as to facilitate the business of the Court. The issues could not, however, be altered without an amendment of the summons, which would increase the amount concluded for, which was not competent under the Act of 1868. Reclaiming note refused.

Act.—*Millar, Scott.* *Agent*—*Archibald Melville, W.S.*—*Alt.*—*Sol.-Gen., Clark, Moncrieff.* *Agents*—*Hill, Reid, & Drummond, W.S.*

GREENOAK v. GREENOAK.—Jan. 11.

Marriage Contract—Parent and Child.—Action at the instance of Robert Greenoak, against his father, to determine his rights under the father's marriage-contract. This was a post-nuptial marriage-contract, whereby Mr and Mrs Greenoak disposed their whole means and estate to trustees. The deed, *inter alia*, revoked all former *mortis causa* deeds, directed that, in the event of the wife's predecease, the husband should have the whole of the estates of both the spouses, and contained the following clause:—"And further providing and declaring that, in the event of me, the said Robert Greenoak, surviving my said spouse, and entering into another marriage, I shall be bound to set aside in a conscientious manner, at least the one-half of my whole means and estate to be divided equally among the whole children of my present marriage after my decease." Mrs Greenoak died, and defr. entered into a second marriage. The pursuer, a child of the first marriage, sought to have defr. ordained to set aside one-half of his means and estate to be divided equally among the children of the first marriage upon his decease, and that there should be an accounting to ascertain the amount.

The L. O. (Barcaple) found that defr. was not bound to make any special disposition or investment of one-half of his means and estate, that the parties had mutually agreed to hold £10,000 as the half of defr.'s means at the date of his second marriage, and ordained defr. to lodge in process a probative deed declaring the sum of £10,000 to have been at least the one-half of his whole means and estate, and that he thereby set aside the same to be divided equally among the children of the first marriage at his decease.

Pursuer reclaimed, and argued that the defr. was bound to make a special investment or trust of one-half of his estate, and that he was merely entitled to the liferent of that half.

The Court adhered, and held that the obligation to "set aside," one-half of his means and estate merely meant that he should so settle his affairs by a *mortis causa* deed that the children would get one-half. Setting aside in the deed was nearly equal to bequeathing. If it meant anything else, it could only be that the amount should be ascertained.

Act.—*Gifford.* *Agents*—*Wotherspoon & Mack, W.S.*—*Alt.*—*Sol.-Gen., Clark, J. MacLaren.* *Agents*—*Fyfe, Miller, & Fyfe, S.S.C.*

SECOND DIVISION.

CONJOINED ACTIONS.—BAYLIS v. STEVENSON, & c contra.—Dec. 3.

Contract.—The question in these conjoined actions was whether pursuer, proprietor of the Scotia Music Hall, Glasgow, was justified in putting an end to a contract between him and defr., a builder, for the erection of a music hall and other buildings in Cowcaddens Street, Glasgow. Baylis

alleged that Duncanson had declined to proceed with his building operations, on the pretext of not having been furnished with a sufficient set of plans.

After proof, the L. O. (Mure) found for Duncanson, and held him entitled to a sum of £86 odds, being the balance of his account for digging and mason work, and also to £470 of damages.

Baylis reclaimed; but the Court in a judgment turning entirely upon the import of the correspondence, adhered.

Act.—Sol.-Gen., John M'Laren. *Agents*—Millar, Allardyce, & Robson, W.S.
—*Alt.*—Trayner. *Agent*—John Thomson, S.S.C.

APP.—FRASER v. FRASER.—Dec. 3.

Master and Servant.—Appeal from the Sheriff Court of Inverness-shire, in an action by John Fraser, shopman, against the firm of Fraser & Co., Inverness, concluding for salary at the rate of £100 a-year in respect of services as traveller and shopman between Sept., 1866, and Feb., 1868. The defence was that pursuer was not to be remunerated by salary, but by a share of the profits of his own sales. After a proof and production of correspondence, the S.S. (Thomson) found for defrs. The Sheriff (Ivory) recalled, and found for pursuer, and allowed him £90 for the whole period. The Court adhered.

Act.—Mackintosh. *Agent*—James Webster, S.S.C.—*Alt.*—Keir. *Agent*—Eneas Macbean, W.S.

PTN.—HENDERSON, FOR INTERIM LIBERATION.—Dec. 3.

Cessio Bonorum—Interim Liberation.—Question whether an application by the pursuer of a cessio for interim liberation pending the running of the thirty-five days' *inducia*, was incompetent under s. 15 of the Cessio Act. *Held*, that it had been settled by a number of cases, and particularly by the case of Trainer, 16th June, 1838, 16 Sh. 1140, that such an application was incompetent. There had, no doubt, been certain cases of a more recent date which had been urged as sanctioning a different view (*viz.*, Anderson, 20th Feb., 1849, 11 D. 679; and Marnoch, 4th March, 1857, 19 D. 598); but these were unopposed applications in cases where the *inducia* expired during vacation, and where what was granted was a *supersedere* of diligence, and that in absence.

Act.—Brand.—*Alt.*—Rhind.

APPEAL—COCKERILL v. FRATERNITY OF MASTERS AND SEAMEN
IN DUNDEE.—Dec. 10.

Friendly Society—Husband and Wife—Aliment.—Action by the Fraternity of Seamen in Dundee against Robert Cockerill, mariner in Dundee, and Mrs Elizabeth Marver or Cockerill, his wife, for repetition of advances made by pursuers to Mrs Cockerill between 1856 and 1868, when her husband was absent from this country, and supposed to be dead.

Cockerill pleaded—(1) That the advances were made in charity and not in implement of any obligation incumbent on the Society, and that charity given, though under error, could not be recovered; (2) that the debt, if any was due by the wife, who had received the money, and who, being reputed a widow at the time, could not be said to have bound her husband on the only principle on which a wife could bind her husband—*viz.*, contracting upon his credit.

The S. S. (Campbell), after a proof and production of the charter and by-laws of pursuer's corporation, found that the sums advanced by pursuers

were advanced in the *bonâ fide* belief that the male defr. was dead, and in erroneous implement of an obligation falling upon pursuers in favour of defr.'s widow; that the male defr.'s wife was, during the period of said payments, left by her husband in indigent circumstances, and that in law he was bound to repay the sums so paid by pursuers to his wife. With regard to Mrs Cockerill, the S. S. assoilzied her. The Sheriff, on appeal, adhered. The male defr. appealed.

The Court adhered. They held that except a certain small sum advanced confessedly as charity, the advances were payments made out of a fund to which appt. had subscribed, and which was liable to pay a fixed annuity to his widow, and that the claim for repetition was good against the husband, in respect that the money was advanced for the wife's aliment.

Act.—*Advocatus, Hall.* Agents—*Lindsay & Paterson, W.S.*—*Alt.*—*J. C. Smith.* Agents—*Ferguson & Junner, W.S.*

MALCOLMS v. MALCOLM'S EXECUTORS.—Dec. 10.

Executors—Commission—Interest.—The late Robert Malcolm, farmer, Harlang, near Wick, died in 1853, leaving a testament by which he appointed defra. to be tutors and curators to his children (all of them under age), and to be "executors for behoof of my children, as above." At his death, the testator was tenant of certain farms and grass parks on verbal leases, and after his death the executors—as they alleged at the request of the children, and in the conviction that it was for the interest of the children to do so—carried on the farms for many years, and with the result that the estate was considerably benefited thereby.

The children on coming of age brought this action of count and reckoning against the executors, and the principal disputes between the parties were (1), Whether defrs. were entitled to charge commission for their management of the farms; and (2), the executors not having kept the executry funds in a separate executry account in the bank, but having mixed them up with their own funds, what was the rate of interest on the balances in their hands in which the executors were liable?

The L. O. (Barcaple) held (1) that defrs. were not entitled to charge commission; and (2) that they were liable in interest at 5 per cent., with annual accumulations.

Defra. reclaimed, and (1) with regard to the question of commission, they argued that, as they were merely executors, and as the management of farms did not form any part of their duty as executors, they were entitled to remuneration for their trouble; and that, even if it were to be held that they had accepted the offices of tutors and curators, and had managed the farms as such, they were entitled, in accounting for the profits, to charge for their trouble, as in *Wilson v. Wilson*, 1789, M. 16,376; and (2) with regard to the question of interest, they argued that there was no absolute rule compelling the Court to exact 5 per cent. interest, with annual accumulations, on trust-funds in the hands of the trustees, who mixed up the trust-funds with their own private funds; that the rate of interest to be exacted depended upon circumstances (*Campbell v. Keith*, 2 D. 1367; *Fortune's Trustees*, 2 D. 59; *Lambe v. Chapman*, 16, s. 219); that the report of *Wellwood's Trustees v. Boswell*, Dec. 1, 1856, 19 D. 194, relied on by the pursuer, was erroneous, as shown by the list of errata at the beginning of the volume; that in the present case, looking at the *bona fides* of the trustees, their responsibility, and the beneficial character of their management, that

the Court, if there were to be annual accumulations, ought to limit the interest to 4 per cent., and that as they needed to hold in hand a sum to meet contingencies, a sum should be fixed by the Court on which no interest should run.

The pursuers were only called on to answer with reference to the question of interest, and maintained that there was nothing in the circumstances of the present case to take it out of the general rule laid down in the case of Wellwood's Trustees *supra* that trustees mixing up trust funds with their own must pay interest at "the highest legal rate."

Held—(1) that defrs., in managing the farm, must be held to have managed as tutors and curators for the children, and were therefore not entitled to make profit out of their office; and (2) that looking to the whole circumstances, the interest ought to be fixed at 4 per cent., and should be calculated on the footing that the executors had been entitled throughout to retain in their hands, to meet current expenses, £100, without being obliged to pay any interest on that sum.

Act.—Pattison, Asher. *Agents*—J. & W. C. Murray, W.S.—*Alt.*—Gifford, Black. *Agent*—D. Forsyth, S.S.C.

APPEAL—BRYDON v. DRUMMOND.—Dec. 10.

Process—*Competency of Appeal*.—Appeal from the Sheriff Court of Perthshire, in which the question was as to the competency of the appeal. The Sheriff, on 3d Dec., 1868, had pronounced a judgment which exhausted the merits of the cause, and said nothing about expenses. Thereafter, on 27th Feb., he took up the question of expenses on the motion of appt., and decided it against appt. The present appeal was then brought too late, if the interlocutor of 3d Dec. was to be taken as the last interlocutor in the cause, but otherwise within the time allowed by the Act. The question was—(1) Whether the Sheriff could competently pronounce any interlocutor after that of 3d Dec.; and (2) whether, if not, the appeal could yet competently be brought to get rid of the incompetent interlocutor of 27th February.

Held, that the Sheriff having exhausted the merits on 3d Dec., without mentioning the matter of expenses, the cause was at an end, and there was thereafter no process and no interlocutor; but the Sheriff had assumed that there was a process, and had pronounced an interlocutor, and the Court must entertain the appeal to the effect of determining that there was no process, but, having determined that, they must *quoad ultra* dismiss the appeal as incompetent, with expenses.

Act.—Strachan. *Agent*—D. Milne, S.S.C.—*Alt.*—Shand, Makgill. *Agents*—Tods, Murray, & Jamieson, W.S.

PATERSON AND OTHERS v. N. B. RY. CO.—Dec. 14.

Reparation—*Harbour Trustees*.—Action for £1500 damages, brought by the owners and master of the ship Melitta, against the N. B. Ry. Co., as owners of the harbour of Charlestown, in which pursuers' ship had been damaged through the fault of defrs'. harbour-master. Defrs. pleaded that the action was irrelevant. The L. O. (Barcaple) sustained the relevancy, and adjusted issues. Defrs. reclaimed; and the Court allowed pursuers to amend their averments, which were not sufficiently specific. The question was here raised whether the trustees of a harbour could in any case be liable for the negligence of a harbour-master; but it was held that this point was

authoritatively settled in the affirmative by the recent case of the Mersey Dock Commissioners in the House of Lords.

Act.—*Scott, Asher.* *Agent*—*A. Duncan, S.S.C.*—*Alt.*—*Advocatus, Burned.* *Agents*—*Macdonald & Roger, S.S.C.*

APP.—GREGORY v. HILL—Dec. 14.

Negligence—Collaborateur.—Appeal from the Sheriff Court of Forfarshire, in an action of damages for bodily injury by pursuer, who is a master joiner in Dundee, against defr., who is a potato merchant there. The facts of the case were these:—

Defr., in Sept., 1867, was in the course of building a new house in Blackness Road, Dundee, and pursuer's firm of Shaw & Gregory were contractors for the joiner-work. The mason-work was not executed under contract, but by masons and a foreman employed directly by defr. In the course of the building operations, pursuer was injured by the fall of a stone which two of defrs' masons were carrying across a certain plank or gangway. It was alleged by pursuer that this plank or gangway was too narrow, and that the stone was being negligently carried across it, and that the accident had happened in consequence of this, and through the fault of the masons employed by defr., for whom defr. was responsible.

Defr. pleaded (1) that there was no fault anywhere; (2) that if there was, there was contributory fault on the part of pursuer; (3) that in any event defr. was not responsible for the fault of the masons in a question with pursuer, who was a fellow-*employé* of the masons, engaged with them in the same common work.

The S.S. (Guthrie Smith) repelled all those pleas, and found for pursuer with £160 damages, and interest at 5 per cent. from the date of citation. The Sheriff (Heriot) recalled and assolizied, on the ground of contributory negligence on the part of pursuer. Pursuer appealed.

Held (1) that the accident was the result of fault on the part of the masons; (2) that there was no evidence of contributory fault on the part of pursuer; and (3) that, although the principle of the Bartonshill case and the recent case of Merry & Cuninghame in the House of Lords exempted a master from liability to one servant for injuries sustained from the fault of another, that principle did not apply where the party injured was not a fellow-servant of the party injuring, but an independent contractor. Recalled the interlocutor of the Sheriff, and returned substantially to that of the S.S., with the exception of the decerniture for interest, which was never allowed in an action of damages.

Act.—*Sol.-Gen., Balfour.* *Agent*—*Henry Buchan, S.S.C.*—*Alt.*—*Advocatus, Shand.* *Agents*—*Hill, Reid, & Drummond, W.S.*

APP.—ROBERTSON v. DUKE OF ATHOLL—Dec. 15.

Judge—Declinature—Corruption—Enmity.—In this case, appt., Mr Robertson, Dundonnachie, made certain charges of enmity and illwill against Sheriff Barclay, which he was appointed to state in the form of an articulate condescendence. A condescendence was accordingly lodged, setting forth a variety of matters which were said to indicate illwill on the Sheriff's part towards appt. Counsel having been heard on the objections to this condescendence stated by the Duke of Atholl in his answers, the Court refused to receive it, and repelled the plea of corruption and enmity.

The Lord Justice-Clerk said that the Duke of Atholl had appeared to maintain two objections to the condescendence which the Court had allowed to be given in (1) that the objection to the Judge ought to have been stated

in initio litis; and (2) that the averments were not relevant. In such a case, where the integrity of a Judge is concerned, it would be satisfactory to have the S. S.'s own account of the allegations made against him; and if the allegations were relevant, he should have an opportunity of meeting the charges. But as he thought that both objections were well founded, it would be wrong not to give effect to that opinion. In regard to the first ground of objection, this was an allegation against the Judge's fitness in regard to the particular case; it was not an objection to his jurisdiction generally. In the case of the Judge's relationship to a party, nothing, not even the acquiescence of parties, could make him a competent Judge, so that there the plea that the objection was not stated *in initio litis* was not applicable. The objection of malice referred to the moral state of the Judge's mind, and a party was bound to plead it at first. The rules relating to this *exceptio suspecti iudicis* were borrowed from the civil law, and the principle was well stated in Voet. ad Pand., v. 1, 448, subject only to an exception when the party was at first in ignorance of the cause of suspicion. This was the law, and it was also reasonable, because the fact of not pleading such an objection at first raises the inference that there was no good ground of declinature, for here Mr Robertson was quite aware at the beginning of the whole grounds of declinature, while he had not stated them until the proof was being led. The character of a Judge was not lightly to be impugned, and it was acting with levity to refrain from stating them when the cause came into Court, and afterwards to state them in the way appt. did. The first objection was sufficient; but it was proper to refer to the general objection that the condescendence was not relevant. He thought that objection good (1) because the facts stated as showing malice on the part of the Sheriff did not relate to the subject-matter of the suit; (2) because they did not infer the malice at all, but at most a certain bias on matters not involved; (3) because he did not think that they even amounted to that. Then the third article, which related to corruption, was altogether imperfect, for the persons alleged to have given the bribe were not mentioned, nor was it said that the alleged bribe was given to obtain a favourable decision in this case against Mr Robertson.

Lord Cowan, in concurring, observed that the first rule in questions of this kind was *primus actus in iudicio est approbatorius iudicis*, which was only subject to this exception, that a *radical defect* in the jurisdiction might be stated or noticed by the Judge at any stage of the proceedings. On this exceptional ground, the case of Ommanney, 13th Dec., had been decided; but such was not the nature of this case, which was an objection *ratione suspecti iudicis*. The facts on which it was founded could not but have been known at the beginning of the proceedings, and ought then to have been stated. As to relevancy, such a charge against a Judge must not be supported by allegations of mere words, but acts inferring malice must be averred. Some of the words here might be incautious, but in spirit they were not other than might have been expected from a zealous executive officer; for the Sheriff was an executive officer in suppressing disturbance and investigating crime as well as a Judge.

Lords Benholme and Neaves concurred.

The Court therefore repelled the pleas stated to the competency of the Judge, and, after some further discussion, granted appt.'s motion to be allowed to lead further proof on condition of his paying the whole expenses hitherto incurred in this Court.

Ad.—Hall. Agents—Lindsay & Paterson, W.S.—Alt.—Sol.-Gen., Lee. Agents—Tods, Murray, & Jamieson, W.S.

SPECIAL CASE—REV. SHOLTO CAMPBELL DOUGLAS AND OTHERS.—Dec. 17.

Entail—Provisions to Children.—In this special case, two questions were raised (1) Whether, in calculating three years' free rent granted by the late General Monteath Douglas as a provision to his daughters, Mrs Yorke and Mrs Monteath Scott, out of the estate of Rosehall, of which he was heir of entail in possession, the actual lordship derived from minerals in the year current at his death was to be taken; or (2) an average of the lordship derived from that source during a number of years preceding the granter's death, and if so, whether three or seven years should be taken in paying the average. *Held*, that the decision in *Wellwood v. Clarke*, 20th Dec., 1848 (11 D. 248), settled that, in the case of a mineral lordship, an average must be taken in order to ascertain the fair annual rent or value of the estate; but as in their case a new lease had been granted, with a greatly increased lordship, two years before the year current at the date of the granter's death, that the proper average to be taken was that of the last three years' lordship, and not of seven years, as had been done in the case of *Wellwood*.

Act.—Gifford, Duncan. *Agent*—John Gibson, jun., W.S.—*Alt.*—Sol.-Gen., Mackay. *Agent*—Alexander Howe, W.S.

APP.—ROBERTSON v. DUKE OF ATHOLL.—Dec. 16.

Declinature to State Defence.—Appeal from the Sheriff Court of Perthshire, by Mr Robertson, Dundonnachie. In a Petition by the Duke of Atholl, craving the Sheriff to ordain appt. instantly to restore the turnpike gate at Dunkeld Bridge, which he had violently thrown down, and to interdict appt. from unlawfully entering upon or destroying any part of the bridge, etc., appt. entered appearance in the usual form; but at the first calling in Court he appeared personally, and stated that he declined to state any defence. The S. S. thereupon held him as confessed, and granted decree in terms of the petition, and allowed petr. to restore the gate at appt.'s expense.

Appt. having appealed, contended, in the first place, that the case should be remitted to the First Division, where the declarator as to the Duke's rights to levy pontage at the bridge was now pending. This motion the Court refused, as the affirmance of the contention of the public in that case by no means involved that appt. was right in this case. Appt. then moved to be allowed to state his defences on the merits now, and in this Court. This the Court, in the peculiar circumstances of the case, allowed, holding that they had power to do so under s. 72. of the recent Court of Session Act. Appt. was, however, found liable in the whole expenses in both Courts since the date of the interlocutor, holding him confessed in respect of his declinature to lodge defences.

Act.—Scott. *Agents*—Lindsay & Paterson, W.S.—*Alt.*—Sol.-Gen., Lee. *Agents*—Tods, Murray, & Jamieson, W.S.

APP.—NICOLSON v. DALLAS.—Dec. 16.

Adjournment of Proof.—Appeal against a judgment of the Sheriff of Inverness-shire, refusing a motion made by appt. for an adjournment of a diet of proof. The reason urged for the adjournment was that appt. (who was defr. in the action) had been entitled to expect the attendance of pursuer at the diet of proof, and had therefore not cited him, and that pursuer had not appeared at the diet. The S. S. found that the reason assigned was no reason, and the Sheriff adhered. Appt. craved to be allowed further proof under s. 72 of the recent Act; but the Court dismissed the

appeal, holding that no case had been made out for the allowance of proof asked.

Act.—Strachan. Agent—James Barclay, S.S.C.—Alt. Kerr. Agents—Murdoch, Boyd & Co.

ALLAN & POYNTER v. J. & R. WILLIAMSON.—Jan. 5.

Reparation—Negligence—Warehouse-Keeper.—Appeal from the Sheriff Court of Glasgow. The action was brought by Williamsons, wine and spirit merchants, against Allan & Poynter, warehouse-keepers. The question was whether defrs. were liable for the price of a puncheon of whisky belonging to pursuers, which had been lost while stored in defrs' bonded warehouse through the bursting of its hoops. The cask had been warehoused in 1859; the accident took place in Jan., 1869. Pursuers alleged that defrs. had failed to use due diligence, inasmuch as they had not in their warehouse a satisfactory system of inspection. Defrs., while admitting that, as warehouse-keepers, they were liable in due and common diligence, maintained that, in point of fact, such diligence had been exercised, and that the cask had been examined from time to time, in a manner reasonable and according to the custom of the trade. The S. S. (Galbraith) assoilzied defrs., holding that there was no negligence proved. The Sheriff altered and found for pursuers, on the ground (1) that, according to the custom of trade, as proved, defrs. should have employed periodically a professional cooper to examine the casks in their warehouse; and (2) that, in any view, they had failed to have the casks in question examined with reasonable care.

Defrs. appealed, but the Court adhered, holding that, looking to the age of the cask, there was enough in its appearance, as proved, to have put defrs. on their guard against what had happened, and to have made it incumbent on them to have had a careful examination of the cask made. The Court, however, found no evidence of the custom of trade founded on by the Sheriff, and that, indeed, the custom of trade appeared to be quite the other way.

Act.—Watson, Maclean. Agents—Millar, Allardyce, & Robson, W.S. —Alt. —Shand. Agents—J. & R. D. Ross, W.S.

SHAW'S TRUSTEES v. RUSSEL & SON.—Jan. 7.

Lease—Minerals.—Action against defrs., tenants up to Candlemas last of a mineral field belonging to Shaw. The question was as to the construction of the following clause in the defender's lease:—"In the event of strikes of the workmen or other unforeseen occurrences preventing the tenants from raising minerals under the lease to the extent of the fixed rent aforesaid, they shall, notwithstanding thereof, be bound to pay said fixed rent, but shall be entitled during the succeeding years of the lease to work minerals from said property to the extent of such deficiency, free of lordship." It was maintained by defrs. that they were entitled to retain from the lordship due by them for the last two years in the lease a sum sufficient to make up for a deficiency in the minerals disposed of by them in previous years, caused by the impossibility of obtaining from the railway company a sufficiency of trucks to carry off the minerals. Pursuers maintained that the difficulty of obtaining trucks was not one of the unforeseen occurrences contemplated by the clause above quoted, because it was not an occurrence connected with the "raising" of the minerals.

The L. O. (Jerviswoode), after proof, found for defrs., sustaining their

construction of the clause. Pursuers reclaimed; *Held* that the clause did not apply to anything beyond the raising of minerals.

Act.—*Advocatus*, Pattison, Strachan. *Agents*—Scott, Moncrieff, & Dalgety, W.S.—*Alt.*—*Sol.-Gen.*, Clark, Gloag. *Agents*—Wilson, Burn, & Gloag, W.S.

DOUGLAS v. THOMSON.—*Jan. 8.*

Liferent and Fee—Vesting-Service.—Reduction and declarator of titles made up by defr. to heritable subjects in Glasgow, and having it found that said subjects truly belonged to pursuer. The late John Douglas, by trust-settlement in 1832, directed trustees to invest half the residue of his estate in heritable property, and convey to his sister, Janet, in liferent, for her liferent use allenary, and to the children to be procreated of her body in fee. In 1842 the trustees acquired the property now in question, and conveyed it in the terms directed, and infestment followed. At this time, Janet was married to Crawford Thomson, founder in Glasgow, and two children had been born of the marriage. Two other children were afterwards born, and the four survived their mother, who died in 1852. None of them took any steps towards making up a title to the said subjects, and all died intestate without issue. Defender is their uncle and heir of line and conquest, and maintained his right to the property on the footing that there had been a fee existing in their persons, which was now vested, or capable of being vested in him as their heir. Pursuer contended (1) that, during Janet Douglas's life, the fee was in her as a fiduciary fee for her children; (2) that on her death the fee behoved to have been taken up by the children by service to her; (3) that that not having been done, the fee remained in her *hereditas jacens*, or fell back into the *hereditas jacens* of John Douglas, the disposer—in either of which cases it had now been taken up by the pursuer, who is nephew and heir of both Janet Douglas and John Douglas.

The L. O. (Jerviswoode) assolizied the defender. Pursuer reclaimed. The Court adhered, holding that, under a destination to a parent in liferent allenary, and to his or her children *nascituris* in fee, the children when they come into existence are in the position of disponees, and have vested in them without service a right which is transmissible to their representatives. No doubt, for the purpose of obtaining a *feudal title*, it might be necessary that they should serve to their parents or lead a declaratory adjudication, but that was not necessary as far as the *personal right* was concerned; and if the personal right was in the children here, that was enough for defr.

Act.—Pattison, Watson. *Agent*—James Somerville, S.S.C.—*Alt.*—*Advocatus*, Gifford. *Agent*—James Webster, S.S.C.

APP.—MILNE v. FORBES.—*Jan. 11.*

Sheriff—Process—Action Standing Dismissed—Revival of Consent.—Appeal from the Sheriff Court of Aberdeenshire, in which the defender in an action of aliment appealed against an interlocutor of the S. S. holding him as confessed in respect of his failure to appear and proceed at a certain diet of proof. At the calling of the case,

The Lord Justice-Clerk said that there was a matter in connection with this case which he considered it to be his duty to bring under the notice of the Court. The action was raised so far back as May 10, 1865. The first interlocutor was on May 26, 1865, adjourning the case. On August 10, 1865, condescendence and defences were ordered. It was nearly six months thereafter that any step was taken in the cause; but then the action was consent revived, and the condescendence was lodged. No less than two

years and three months after this elapsed before the defences were lodged, seven prorogations and revivals of the action of consent having been granted during that period. And a precisely similar course had been followed with regard to the revival of the condescendence and defences, the condescendence not being revised till July 14, 1869, nor the defences till July 28, 1869. Now, he need hardly say that this was a very scandalous state of matters. The provisions of the Sheriff Court Act had been set at defiance. S. 15 of the statute authorised the revival of actions within a certain time upon "good cause to the satisfaction of the Sheriff" being shown why no procedure had taken place therein. Here it was perfectly evident that no cause at all had been shown, but that the matter had simply been one of arrangement between the parties, or the agents of the parties. He would like to know if appt.'s counsel (respt. did not appear) had any explanation to give of these matters.

It was stated at the bar that the pursuer was litigating on the poor's roll, so that it clearly was not defr.'s interest to press on the action, but the reverse; for even if he was ultimately successful in it, he would be a loser, as he would have his agent's account to pay. If their Lordships would let the case stand over, he would obtain for them the information which they desired.

The case was allowed to stand over.

BELL v. PRESBYTERY OF OLNAFIRTH.—Jan. 15.

Expenses—Parish Manse.—The minister of Nesting presented a petition to the Presbytery craving a visitation of his manse with the view of having it repaired and procuring additions to it; and the Presbytery ordained the heritors to execute repairs and additions to the amount of £322. The complainer, Bell, one of the heritors, had objected to more than repairs, which he maintained might put the manse into a proper condition at the cost of £83. The Presbytery ordained the heritors to lodge plans and specifications, and these were lodged on behalf of one of the heritors who had acquiesced in the decerniture and were finally approved. The estimate put by tradesmen on the specifications amounted to £693. On ascertaining this, Bell wrote to the Presbytery, intimating his willingness to expend £322 on repairs and additions on the manse, but objecting to the sum at which the specifications had been returned. The Presbytery not having answered this letter, Bell suspended the decree, but repeated his offer to accede to £322 being expended on the manse. The L. O. (Manor) remitted to an architect; and his report, in which parties acquiesced, was that £420 should be expended according to a plan varying in some particulars from that of the specifications approved of by the Presbytery. The question came to be, who had succeeded in the litigation? The heritor contended that, having relieved himself by his action of the difference between the appraised value of the specifications and the sum decreed for in terms of the report, he was entitled to expenses. The Presbytery maintained that it was the duty of the heritors to look after the specifications, and that if these were wrong, as alleged in the present case, the heritors were responsible for the error. The L. O. (Ormidale) found the Presbytery entitled to expenses, subject to modification of one-fourth. The heritors reclaimed. The Court adhered, holding that it was the duty of complr. to have attended the meeting of Presbytery at which specifications were lodged, and to have stated his objections if he had any.

Act.—Sol.-Gen., Clark, H. J. Moncreiff. Agents—Campbell, Espie, & Bell, W.S.—Ak.—Shand, W. A. Brown. Agents—J. & R. D. Ross, W.S.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTSHIRE.—Sheriff BARCLAY.

BLAIR v. MILLER.—Oct. 8.

Salmon poaching—Parra—Evidence.—This case is fully explained by the following interlocutor and note by the S.S.:—

Perth, 8th October, 1869.—Finds it proved that on the day libelled defr. had in his possession certain fish commonly known as parra, but which are not named in the prohibitory and penal clause libelled; but finds it not proved that he then had any fish known as smolts, the only fish named in the same section of the statute libelled, and declines to inquire and decide the question in natural science whether parra be or be not salmon fry: Therefore dismisses the complaint, and decerns against complainer in favour of defr. for one pound of costs, with the expense of extract.

Note.—This is a complaint at the instance of Mr Blair, acting for the Tay District Board, against Robert Miller, laid under the 19th sec. of the Salmon Fisheries Act 1868, setting forth that, "in so far as, upon Saturday, the 26th day of June, 1869, or about that time, the said Robert Miller had in his possession nine smolts or salmon fry, and that at or on the banks of the stream called the Machony, a tributary of the Earn, and at a part of the said stream at or near to the farm of Kirkton, in the pariah of Trinity Gask, and county of Perth, and the said nine smolts or salmon fry were seized in virtue of said Act."

The proof is that the accused was found on the banks of the Machony on the day libelled. A river-watcher asked him what take he had? The accused readily answered that he had taken some eels and a few small parra. On being asked to show the contents of his basket he unhesitatingly did so. In addition to the eels, there were found nine small fish, all which were captured by the watchers. These were exhibited in Court in two bottles. An additional third bottle was shown merely by way of contrast, containing a larger fish, which was sworn to be a yellow trout, and admitted not to belong to the salmon family. Five of the smaller fish were sworn to as being parra, and four in the second bottle as belonging to a migratory class which might be the spawn of sea-trout or of the bull-trout, but which were also sworn to be of the salmon tribe. These facts were sworn to by one river-watcher and the river superintendent, but more especially by the keeper of the breeding seminary at Stormontfield. He entertained no doubt as to the five in one of the bottles being parra; but as to the four in another bottle, he could only state that they were of a migratory kind, and fell under another class, which he considered not to be parra, but, nevertheless, to be of the salmon kind. Complainer offered further scientific evidence to establish that all the nine fish were salmon fry; but, from the opinion entertained by the Sheriff, this further evidence was not allowed. To admit such evidence appeared to the Sheriff open to the grave objection that it was to constitute an offence *ex post facto*, and the very necessity of having such evidence established that there was no obvious offence under the letter of the statute.

The solicitor for the defence, on this evidence, took two pleas against conviction.

1st. That it had not been proved that the accused had in his possession

the parrs or other fish *wilfully*, thereby meaning that it must be proved that he was in the *knowledge* that the fish he had in his basket were smolts or salmon fry. The evidence showed that whilst he in his ignorance thought all the nine fish to be parrs, only five fell under that name; and there was no proof that he knew that *any* of the nine fish were *salmon fry*. And,

2d. That the fish in his possession were not proved to be smolts or salmon fry, which are the only words in the clause libelled.

The Sheriff is certainly not much enamoured with the phraseology of the 19th sec. of the Act 1868, which is the one libelled on. The first question is whether the word "*wilfully*," at the commencement of the section, overrides and qualifies the particular offence libelled—that being not the taking, but the having in possession, smolts or salmon fry. It is clear that the term *wilful* was not meant to override the whole clause, seeing that it is shortly afterwards twice repeated; indeed, in one part of the clause there appears the gross absurdity that it is made an offence to place any devices or engine for the purpose of obstructing the passage of the young of salmon; and it is equally made an offence, according to strict grammatical reading, "*wilfully to injure that device or engine*." On the whole, however, it does not appear that the qualifying word "*wilfully*" does reach the act of possession. (Johuston, 25th May, 1868, Couper's Juxtiary Reports, 41). It is next to absurd to suppose that a person merely having possession of the forbidden fish should be dealt with more harshly than one who actually captures the animals; so that it would be necessary to prove that a person *wilfully* caught the forbidden fish, but not when a party may innocently and in ignorance be in possession of the sacred fish—it may even be in the act of cooking or of mastication. A man fishing can scarcely be supposed to do so in ignorance and against his will; and if on a salmon river, he must be held culpable if he, even in ignorance, takes any fish of the salmon kind. But a person may have possession of fish not only in ignorance of the class to which they belong, but even that he had in his possession fish of any kind.

The Sheriff is of opinion, that it is perhaps not necessary to libel *wilful* possession as was pled *in limine*. But before conviction either for taking or possessing fish of the forbidden species, it must appear that the accused party offended culpably, and not in ignorance—that is, that he knew, or under the circumstances should have known, the kind of fish he captured or had in his possession.

There is more difficulty in the second question. The 19th section expressly defines the offence to apply only to smolt or salmon fry. The marginal index (which very properly is held no part of an Act, and is often even contradictory to the text) in this instance makes use of the terms, *the young of salmon*.

The words of the text are not cumulative, but descriptive. The law does not say smolt *and* salmon fry, but smolt *or* salmon fry—that is, smolt being salmon fry, or, as the margin has it, the young of salmon.

The proof showed that the accused party had possession of a certain number of parrs, and vaguely knew them by that name; but it must be further shown that these are not merely "*the young of salmon*," as in the margin, but are either "*smolt or salmon fry*," as set forth in the text and in the complaint. Now, the Act 1862, (which appears still in force) declares salmon not only to include salmon, but, in addition, "*grilse, sea-trout, bull-trout, parrs, and other migratory fish of the salmon kind*." This,

certainly, is very comprehensive, and, with the exception of eels and flat fish, appears nearly to include all river fish whatever. The complaint is not for having in possession salmon (and unless when in a foul state such is not an offence), but it is having in possession smolts or salmon fry, and the offence applies to the whole year—opentime as well as closetime,—and, therefore, is most stringent and severe. Again, it will be noticed that the interpretation clause distinguishes smolts from parrs, consequently it does not at once follow that the accused has contravened the words of the statute, since, whilst smolts are expressly mentioned, parrs are not. This, then, admittedly drives the complainer, if it be competent, to prove, as he offered to prove, that parrs, which confessedly are not smolts, are the “fry of salmon.”

By the first Act of the multitudinous series (1828), section 4, which perhaps stands still unrepealed, the offence of possession is made applicable to “spawn, smolts, or fry of salmon;” and let it be observed that “wilfully” is there expressly repeated before the enactment as to possession. Reading the whole section of the Act 1868 in connection with the 4th sec. of the Act 1828, the S. S. is of opinion that what is meant to be included are not parrs, but smolts and salmon spawn, and spawning beds; and that the 19th sec. does not apply to parrs that have reached a higher state of progress than mere fry.

A sketch of the Acts with reference to the nomenclature of salmon will illustrate the meaning of the S. S. The first of the series (1828) included “salmon, grilse, and other fish of salmon kind.” In 1844, a party was brought before the S. S. (who is now judging of the present case) charged, under the Act 1828, of being in trespass with intent to kill fish as particularly enumerated in the Act. It was proved that the accused party had taken *whillings*, not named in the statute. It was thereon maintained for the complainer that whillings were of the salmon kind. Contradictory evidence on this question was given, and though the evidence certainly preponderated for the complainer, the S. S. refused to convict (*Dundee Law Chronicle*, vol. ii., p. 133). This judgment was acquiesced in, and the proper remedy was taken the very same year by the Act in 1844, expressly mentioning *whilling* in the enumerated class.

In 1850, a complaint was presented to the S. S. (Grahame) at Dunblane against a person for taking parrs from the River Allan. There, again, contradictory evidence was given as to whether that fish was of the salmon kind, and the Judge dismissed the complaint on similar grounds as the S. S. at Perth had previously done. (*Dundee Law Chronicle*, vol. ii., p. 124). The fishing proprietors acquiesced, and once more met the difficulty as they did before with smolts. The Act 1862 extended the term salmon so as for the first time to include itself, and also grilse, sea-trout, bull-trout, smolts and parr, and other migratory fish of salmon kind.” Under this extension there could be no doubt that, in all sections which impose penalties for interference with salmon, parr is included.

But the Act 1868 introduces a new and highly penal offence, and which goes far beyond the protection of salmon in its advanced stages. It is limited only to one of the enumerated names, “smolts,” with the *addenda* or (not *and*) salmon fry, which is merely a designation of smolts. If it was meant to extend the penalty to a farther and undefined extent, and to include parrs or any other class of salmon fry, or the young of salmon, within the clause and under the prohibition, it should have been so enacted, and the question not left to be ascertained by scientific proof. Suppose the

clause had simply been for the protection of salmon fry or the young of salmon, without the mention of smolts or any named fish, would it have been permitted that a person could be prosecuted and punished for interference with smolts, parrs, or any other fish which could have been proved by scientific men to be the rising generation of the salmon family from the ova to the oven? The S. S., therefore, feels himself constrained to repeat his views in the smolt case, confirmed by his brother at Dunblane in the case of the parrs. The simple ground of his judgment is, that in the penal clause founded on, parrs are not mentioned, and he declines to inquire and decide the scientific question whether parrs are salmon fry or the young of salmon. The proprietors have their remedy by expressly including parrs in the section amongst salmon fry, and so leave no room for escape from the penalty.

SHERIFF COURT OF FORFARSHIRE, DUNDEE.—Sheriffs HERRIOT and GUTHRIE SMITH.

DUNCAN (PORTER'S TR.) v. M'LEAN.—Oct. 14.

Act of Grace—Disposition omnium bonorum—Stamp-duty.—In this case the pursuer sued, as trustee under a disposition *omnium bonorum* granted by Mrs Janet Morris or Porter, for her whole just and lawful creditors. Mrs Porter had been incarcerated by a creditor, Begg, and on applying for alimient under the Act of Grace was found entitled to same, and appointed, if duly required, to execute a conveyance *omnium bonorum* in favour of Begg for behoof of her whole creditors. Begg being resident at a distance, the conveyance was taken instead to the present pursuer. It bore no stamp, and the defr. maintained that not having been taken in favour of the incarcerating creditor in terms of the Act 6 Geo. IV., c. 62, a. 7, a stamp was necessary. The pursuer referred to *Rae v. Henderson*, 23d Feb., 1837, 15 Sh. 653, and stated that, though it does not appear from the report, the conveyance there was to a third party.

The Sheriff-Substitute pronounced an interlocutor, finding "that said deed not having been executed in terms of the statute 6 Geo. IV., c. 62, or under a process of cessio, requires a stamp; sists farther procedure to enable the pursuer to get the deed stamped, and decerna.

The pursuer appealed, and lodged the deed with the Commissioners of Inland Revenue, who adjudicated it "not liable to duty," and the Sheriff accordingly recalled the interlocutor of the S. S.

Act.—Cumming.—Alt.—Calder.

SHERIFF SMALL DEBT COURT, PERTH, PERTHSHIRE.—Sheriff BARCLAY.

SMITH v. WATSON.—Nov. 2.

Freshore—Property.—The question raised in this action was, whether the public have a right to take grass on the banks of the River Tay within high-water mark, or whether such right belongs to the proprietor or tenant having land adjoining the river? The S. S. issued the following notes of his judgment:—

This summons claims £3 sterling, "being loss and damage sustained by the complainer, in consequence of the defender having illegally and unwarrantably, on or about the 12th day of July, 1869, cut and removed a large quantity of grass growing on half an acre or thereby of the pasture

ground of the farm of Inchyra, situated at the side of the River Tay, and along the banks or foreshore of said river, and belonging to the complainant, and which has been possessed by him since his entry to said farm at Martinmas, 1866, and by his predecessors in his farm for time immemorial."—The facts are these: The grass forming the subject of the action admittedly is on the bank of the River Tay, and within high-water mark. The adjacent land is the Barony of Inchyra, to which appertains a right of salmon fishing. The pursuer is tenant of the farm of Inchyra, expressly including the "pasture land along the river side." The defender has no express right or title to any part of the ground leased. But it was stated that the previous tenant of Inchyra had for several years permitted him to cut and carry away the grass on the river side within high-water mark.

This defence resolves into the plea that all the ground within high-water mark is public property, and that, therefore, the pursuer has no further right thereto than the defender, or any other of the public. The foreshore of the sea and navigable rivers is well known to be vested in the Crown. The nature and extent of the Crown right has often been matter of contest, and whether the subject be *res publica*, *res communis*, or *inter regalia*. It is perhaps not yet very clear whether the right is one patrimonial, and which may be granted by the Crown to heritors, or whether it is held inalienably in trust for the public. (See as to this, 11th March, 1846, Marquis of Ailes, 8 D. 752). The law as laid down by Mr Erskine in his Institutes, B. 2 T. 1, S. 5 and 6, and founded on the civil law, appears to be that adopted in the course of many decided cases:—"Not only rivers themselves and their bed or alveus, but their banks, also are public in so far as they may be subservient to the purposes of navigation; and therefore no work or building can be raised either in the bed or upon the banks of a river which may hurt its navigation; but in every other respect the property of the banks belongs to the owner of the conterminous ground as an accessory." Again, the learned commentator remarks—"The banks of rivers are said to be public so far as the shore may be used either for navigation, or the protection of trade, or the defence of the State."

In the case, 27th May, 1807, Innes (Hume's Decisions, 553), it was found that a bank of shelly land within the floodmark of the sea was a pertinent of the adjacent estate. Although tenants on the estate and others from other estates had been in use to carry off the sand for agricultural purposes, the Court unanimously found, in a question with tenants who had no express grant, that the proprietor could prevent their interfering with the bank without his permission. Similar decisions were given 7th January, 1837, M'Alister, 9 Jurist 261; and especially 24th November, 1857, Lord Saltoun, 30 Jurist 54. In this last mentioned case, tenants of adjacent land, who averred and offered to prove forty years' use of taking seaweed and shell sand from the seashore, were not even allowed an issue in a question with the proprietor of the estate of which the seashore formed the boundary.

There appears, therefore, no manner of doubt that the grass in question is the property of the pursuer. If the defender, as one of the public, has a preferable claim, then equally so may every member of the public; and thus most unseemly and dangerous strife might ensue for the first appropriation of a subject after all of but small value—at least it so appears in the present case, though in some parts of the river Tay a valuable reed grows luxuriantly within high water mark, and is used for thatching and similar

purposes. The defender's plea goes the length of holding all material within floodmark of sea in rivers to be *res nullius*, and so, *cedunt occupanti*. For such a plea there exists no semblance of authority.

The question of course should more appropriately (but much more expensively) have been tried by way of interdict; and if the defender had the privilege from the previous tenant (which, by the way, is destructive of an inherent right in himself), and had no notice that the privilege was withdrawn by the pursuer, there may be no claim but for nominal damages, so as to determine the right in future.

Ad.—Henry Gordon.—*Alt.*—Horace Skeels.

SHERIFF COURT OF FORFARSHIRE, DUNDEE.—Sheriffs HERIOT and GUTHRIE SMITH.

CAIRNS v. LILBURN.—Nov. 20.

Sale—Delivery in Parcels—Payment of Price—Debts Recovery Act—Jurisdiction.—In November, 1866, pur. sold to defr. 3000 stones of hay. The sale note, signed by pursuer, stipulated "said hay to be put on Ry. Tka. for me, as I require it, all to be taken delivery of before March, 1867—terms, cash on delivery." During Feb. and March, 1867, five parcels were delivered, the price of which, under the contract, amounted to £115 11s 3d. On 4th April, defr. paid the pur. £90, and this action was brought in the ordinary Court for the balance and interest. Defr. pleaded that hay having risen in price in the spring of 1867, pursuer had refused to implement the contract, and he had to go into the market and purchase hay at a high rate—the difference between which and the contract price was equal to the sum sued for, which he claimed right to retain as damages for breach of contract. He also pleaded that the case should have been brought in the Debts Recovery Court. The pursuer replied that the breach of contract was on the part of defr., he having refused to pay for the hay as delivered, and that the case, being an action on a special contract, was rightly brought in the ordinary Court.

The S. S. pronounced an interlocutor, finding "that the bargain was that the hay should be sent in such parcels and at such times as the defr. might order, but that each parcel should be paid for on delivery;" that the price of the quantities delivered was £115 11s 3d, "but that defr. failed to pay the price in terms of his undertaking, and only paid £90 to account on 4th April; Finds in law, that in the above circumstances, pursuer was entitled to refuse delivery of the remainder of the hay, and that defr. is justly indebted and resting-owing to the pursuer in the price of the portion delivered, so far as the same was unpaid, with interest on the value of each parcel from the date of delivery: Therefore repels the defences; decerns in terms of the conclusions of the summons; Finds defr. liable in expenses," etc.

Note.—It is well settled that in a contract of sale, when nothing is said as to payment of the price, the purchaser cannot demand the thing sold without paying or offering to pay the price, and the seller cannot demand the price without delivering or offering to deliver the subject matter of sale. The two things are concurrent, the one being the condition of the other, and when the subject sold is of such bulk that delivery can only be made in parcels, the seller is entitled on delivery of each parcel to payment of a proportionate part of the price. So it was decided in *Hall & Sons v. Scott*, 19th Jan., 1860, 22 D. 413, and the present case is still clearer, for the

manner of payment is made a matter of express stipulation. "Cash on delivery" can only mean cash when each separate portion was delivered.

The defender appealed, but the Sheriff adhered to his Substitute's judgment, with the following

Note.—The Sheriff is satisfied that the decision of the S. S. in this case is sound.

The law is quite established against the view contended for by the defr. A person purchasing goods of this kind is bound to pay for each quantity delivered on delivery. See *Lind v. Shields*, 12th Nov., 1863; *Oxendale v. Weatherall*, 9 B. & C. 386. The defr. was not entitled to keep back part of the price of the parcels delivered, in case the pursuer should fail to implement his bargain. The duty of each is to implement the bargain so far as it has proceeded.

The defr. wishes to be allowed a proof that he has suffered loss by the pursuer not delivering the rest of the hay. The Sheriff is of opinion that he has not made any averment on the subject entitling him to a proof. The defr. himself was to blame for not getting the rest of the hay. He admittedly had not paid the price of all he had got, and in such circumstances the pursuer was entitled to refuse to deliver.

The Sheriff is of opinion that the pursuer was right in bringing this action in the ordinary Court.

SHERIFF COURT, AIRDRIE, LANARKSHIRE.—Sheriffs BELL AND LOGIE.

ROBERTSON v. REID.—Dec. 9.

Proof—Admissibility of Witness—Filiation and Aliment.—Action of filiation. Pursuer adduced as a witness John Allan (13), who was examined for her, and cross-examined for defr. After pursuer's proof was closed, defr. cited and adduced the same witness on his behalf, on points in regard to which the witness had not been previously examined. The S. S. refused to examine Allan, on the ground that "defender knew what evidence he was to give, and ought to have then cross-examined the witness if he thought proper. Now, to examine him would lead to great evils in tampering with witnesses. See *Watt v. Brown*, 10th Jan., 1863, (2d Division)." The defender appealed, and the Sheriff "Finds that said appeal was directed against the deliverance by the S. S. in the course of the proof refusing to allow defr. to examine under his conjunct proof the witness John Allan, who was examined by pursuer in the course of her proof in chief: Finds, however, that the witness was not adduced by defr. with the view of being re-examined on any matter as to which he had been previously examined, and if the evidence be conjunct to that of pursuer, such re-examination is competent, and it is, at all events, within the power of the Court under s. 4 of 15 and 16 Vict., c. 57, to permit the witness to be recalled, which, in the present instance, it seems expedient to do, under reservation of all objections to the competency of any interrogations which may be put to him on the ground of their not being conjunct; therefore recalls the said deliverance, allows the examination of the said witness to be taken, and remits, etc.

Act.—J. K. Peebles, Airdrie.—*Alt.*—A. Y. Rose, Airdrie.

THE

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ON THE CONFLICT OF LAWS ADMINISTERED BY THE SUPERIOR COURTS IN GREAT BRITAIN.

No. VI.—CIVIL JURISDICTION—*Continued.*

In the last paper I endeavoured to describe the species of facts which the Courts of England and Scotland, applying to modern life the doctrines of the Civilians, have held to constitute *domicile*. I shall now advert to domicile regarded as a *condition of rights*, a point of view from which Lord Westbury has vaguely, though not incorrectly, called it, "the criterion established by law for the purpose of determining *civil status*," (*Udny v. Udny*, Law Rep., 1 Sc. Ap., 457). It is more pointedly and accurately designated by Puchta, "Der örtliche Mittelpunkt der juristischen Wirksamkeit einer Person," (*Institutionen*, vol. ii., p. 17, § clii.)

I shall in the sequel consider at length most of the juridical consequences of domicile. They may be shortly summarised as follows:—

1. The *forum* of the defender's domicile is *forum competens* in personal actions.

2. Domicile of the husband is the sole criterion of jurisdiction in certain cases relating to personal *status*, and depending on the validity of a marriage (*Pitt v. Pitt*, 3 M'Queen, 637).

3. Domicile at the time of death regulates the distribution of the movable or personal estate of an intestate (*Ersk. Inst.*, iii., 9, § 4.; *Bell*, pr. § 1861; *Somerville v. Somerville*, 5 Ves., 786).

4. Domicile at the time of death points out the country by whose laws the construction or interpretation of Testamentary Acts is governed (*Trotter v. Trotter*, 4 Bl., N. S. 302, 3 W. & S. 407; *Enohin v. Wylie*, 10 Cl. H. of L. 1).

5. The laws of the country of the domicile at the time of death point out the person having right to be clothed with the paramount title to sue for, receive, and deal with the movable or personal estate,

and to give valid discharges to persons indebted to the *hereditas* (*Doghioni v. Crispin*, Law Rep., 1 H. of L. 301).

6. A Will, or Testamentary Act, is duly executed or performed, if executed or performed in conformity with the laws of the country of domicile at the time of death (Ersk. Inst., iii. 9, 4; Bell, pr. § 1861; 24 and 25 Vict., c. 114, § 1).

7. Domicile within the United Kingdom at the time of death is the criterion whether or not legacy duty is payable to the Imperial Exchequer (*Lord Adv. v. Lamont*, 19 D. 779; *Atty.-Genl. v. Dunn*, 6 Mees and Welsb, 511; *Jeves v. Shadwell*, L. R., 1 Ch. 1).

8. Domicile of the father at the time of the birth of the child and of subsequent marriage between the parents, determines whether or not the Scotch law of legitimation, *per subsequens matrimonium*, is to give the personal *status* of legitimacy to the child. In case the domicile is in a different country at the time of the marriage, from that in which it was at the birth, probably that at the time of birth will rule (*Rose v. Ross*, 4 W. and S. 289; *Dalhousie v. M'Douall*, *Munro v. Munro*, 1 Robinson, Ap. 475, 492; *Udny v. Udny*, Law Rep., 1 H. of L., Sc. 456).

9. Domicile of the husband at the time of the wife's death (before the Intestacy (Scotland) Act, 18 Vict., c. 23, § 6), was the test whether or not the wife's representatives were entitled to a share of the goods in communion, according to the law of Scotland (*Lashley v. Hogg*; 4 Paton, 581; *Bell v. Kennedy*, L. R., 1 H. of L., Sc. 307).

The principles above-mentioned are recognised in both countries. I may observe further that—

10. In England, in case of persons dying intestate before the 18th of December, 1856, domicile was the criterion whether the custom of the province of York, or that of Canterbury, applied to the distribution of the estate (5 Ves., 159; 19 and 20 Vict., c. 94, § 4).

11. Domicile at the time of death, in case of persons dying within Scotland, is the criterion as to what Commissary is entitled to grant confirmation of the goods within Scotland, (M. Dict. Forum Competens, Div. vii.)

12. Domicile, in Scotland, England, or Ireland respectively, evidenced as in the statute mentioned, is the condition that confirmation by the Commissary in Scotland, and probate or administration granted by the proper authority in England or Ireland, shall be authenticated by the proper Court or officer in terms of the Act, for the purpose of receiving effect in the respective sister countries (21 and 22 Vict., c. 56, secs. 9, 12, 13, 14).

13. Domicile in England or Ireland gives jurisdiction to the Court for Divorce and Matrimonial Causes under the Legitimacy Declaration Act 1858, and, under the same Act, domicile in Scotland gives jurisdiction to the Court of Session for the limited purpose of declaring a person entitled to be deemed a natural-born subject of Her Majesty.

14. It has been held in the Court of Chancery in England that when a person becomes amenable to a foreign Bankrupt law, and then

dies, the question whether the assignee in the foreign Bankruptcy, or the legal personal representative in England, has the paramount title to receive his personal estate situate in England, depends on his domicile at the time of the insolvency (Re Blithman, L. R., 2 Eq. 23).

From this digression upon the material and juridical meaning of the word *domicile*, I return to the position that jurisdiction may be founded against a defender on the ground of his domicile. And first:—

In personal actions the *forum* of the defender's domicile is *forum competens*. By personal actions I mean not only those which conclude that the defender may be decerned to pay or perform; but all those actions concluding for a decree which can only confer upon the pursuer a *jus in personam* against the defender or defenders. Now declaratory actions, unless directed against the Lord Advocate or other officers of the crown for Her Majesty's interest (*i.e.*, the public interest) are personal in this sense, that the decree following upon them can only give a *jus in personam* against those who have been made parties to the action: for nothing is more certain in our law, than that the decree in a declaratory action concludes the right of none but those who have been properly made defenders. What Lord Stair (iv. 3, § 45, p. 585) means when he says that declaratory actions are counted neither personal nor real, is probably this, that the duties which are laid upon the defender by the decree are commonly negative duties and are, to that extent, *ejusdem generis* with the duties which are laid upon everybody in the case of a right *in rem*.

That the *forum* of the domicile is *forum competens* in personal actions is clear from the passage of Erskine above referred to (Inst. i. 2, § 16), and is established by authority; (*Sir S. Graham v. Stevenson*, August 9, 1785, Hume, 250; *Leader v. Hodge*, July 13, 1810, Hume, 261; *Don v. Kealy*, 12 D. 1016). The proposition has, indeed, not often been called in question.

For the purpose of jurisdiction, the place where a person is, is *prima facie*, his domicile; (*Bempde v. Johnstone*, 3 Ves., 201; *Bruce v. Bruce*, 2 B. and P., 230, Taylor on Evidence, § 165), and to avoid the presumption that would arise from a decree following upon a summons duly executed by service upon the defender personally within Scotland (especially since the Court of Session Scotland Act 1868, 31 and 32 Vict., c. 100, § 24) the defender, if he excepts to the jurisdiction, ought to appear and plead, not only that he has no domicile or residence within the jurisdiction, but that his domicile or proper *forum* of jurisdiction are in some other specified place. *Grant v. Pedie*, W. and S., 718; *Johnstone v. Strachan*, 23 D. 760; *Sinclair v. Smith*, 22 D. 1475; *Joel v. Gill*, 21 D. 931; *Shaw and Mandy v. Dow and Dobie*, 7 M'Ph. 450). In disposing of the plea, it is usual for the Lord Ordinary to find, as matter of fact, that the defender had his fixed or proper domicile in a specified place, in or out

of Scotland, as the case may be; *Ritchie v. Fraser*, 15 D. 206). It seems that where the defender is designed in the summons as "now residing" at a specified place in England, or elsewhere out of Scotland, or where the person states on the record that the defender is resident elsewhere than in Scotland, it lies with the pursuer to set forth and prove the facts on which he relies to make out that the Court has jurisdiction; (*Bell v. Stewart*, 14 D. 837; *Shaw and Mandy. v. Dow and Dobie*, 7 M'Pherson, 450. It is now by A. S., December 18th, 1868, (*Journal of Jurisprudence*, February, 1869), imperative on the pursuer in libelling his summons against a party not designed as resident or carrying on business within Scotland, either to state the defender's known residence or place of business, or to set forth expressly that the defender's residence or place of business (if he be engaged in business) are unknown to the pursuer.

I proceed to consider a class of cases which in all questions of jurisdiction stand entirely distinct from all other cases. They arise out of the marriage tie, and were formerly in this country subjected to the exclusive jurisdiction of the Consistorial Courts, whence they are still called Consistorial actions. The first and most important of these is the action for Divorce.

In actions for Divorce, where there has been no previous judicial separation, the domicile of the husband is the sole and exclusive criterion whether or not the Court has jurisdiction. In order to demonstrate this proposition, it is necessary to go back upon the history of the phases which the question of jurisdiction has assumed in the matter of divorce in our country since the beginning of the present century. With the increasing facilities for communication between this and the sister country, it became a common practice for English persons to come to Scotland, and collusively to attempt to avail themselves of the aid of the Scotch Courts to get a decree of divorce. By so doing they imagined they could evade the laws of their own country. In England nothing but an Act of the Legislature could dissolve the marriage tie; and marriage was not deemed to be, as in Scotland, dissoluble on the ground of the husband's adultery without special aggravations. The practice here referred to received a check by the case of *Lolly*, who, after a decree being obtained against him in the Scotch Consistorial Court, returned to England, and having again married there, was transported for bigamy. Probably substantial justice was done. The English Judges, however, with the narrow legal notions prevalent in their time, appear to have thought it a sufficient ground for their decision, that the marriage which the Scotch decree purported to dissolve, was an English marriage. For they thought that an English marriage was indissoluble by the Court of another country, on grounds for which it could not have been dissolved in England. Had they put their decision on the ground that the parties were English, both by birth and domicile, and that *Lolly* had never become truly domiciled in Scotland, we might have been spared the irritating

controversy to which *Lolly's* case appears to have given rise. In the meantime, the Scotch Commissaries (the Consistorial Court of first instance), deeply sensible of the necessity of preventing our Courts being used by English parties as instruments for evading the law of England, proceeded with great caution to scrutinise in every case the grounds of their jurisdiction. When the question of *Lolly's* divorce itself had been before the Commissaries, they had hesitated, suspecting collusion; and in many cases, both previously and subsequently to *Lolly's* case, they refused to entertain questions of divorce, partly on the ground of the *locus contractus* being in England, and partly on the ground that the parties had no true domicile in Scotland. But in all these cases the Court of Session, to whom lay an appeal from the decision of the Commissaries, sustained the jurisdiction, and remitted to the Commissaries to proceed with the case. The most important of these cases are reported in Ferguson's volume of Consistorial Reports. They are:—1. *Utterton v. Tewsh*, where the parties were both English, and had married in England, but the wife, who was pursuer, averred that her husband had deserted her, and was now living in adultery in Scotland, where he was personally cited. 2. *Edmonstone's* case, where the husband (pursuer) was born and educated in Scotland. While serving in a Scotch militia regiment, then stationed in England, he there married the defender (a Scotchwoman), the ceremony being performed in the English form. He returned with his wife to Scotland, where they resided about eight years. Having then become acquainted with circumstances which led him to suspect that his wife was living in adultery, he raised an action for divorce in the Scotch Court. 3. *Forbes's* case. Mrs Forbes and her husband were natives of Ireland, were regularly married in the Scotch form in Scotland, and a few days after their marriage returned to Ireland. After this they went to the Continent, where Mrs Forbes, who pursued the action, alleged that her husband had deserted her. She further alleged that he had come to Scotland with a female, and had been for some time living there in open adultery. 4. *Levitt's* case. Mrs Levitt and her husband were natives of England, were married in England in 1802, and lived there together, with the exception of a short period of separation, until 1813. In 1813 the husband deserted her and came to Scotland with a woman with whom he continued to live in adultery, —having sold his house in England, and ceased to have any estate there. His wife sued for a divorce. Proof, which was led, did not come up to the point of establishing that the husband had, at the time of raising the action, acquired a permanent domicile in Scotland. 5. *Rowland's* case. In this case the parties were English by birth and also by domicile at the time of the marriage, and for some time afterwards. The husband came to Scotland with a woman with whom he was living in adultery, and during a visit of a few weeks in Scotland, where he received personal citation, the action of divorce was raised against him by the wife.—The first of the cases here enumerated was before the time of *Lolly's* case; the other three were subsequent to it.

In all these cases the Court of Session, reversing the decision of the Commissaries, sustained the jurisdiction, and remitted to the Commissaries to proceed. The Commissaries, accepting the judgment of the Superior Court as conclusive, both of jurisdiction and relevancy, proceeded to take proof, and upon the alleged facts being proved, pronounced decree of divorce. These decisions have been since followed in numerous cases by Lords Ordinary, and by a Division of the Court in the reported cases of *Oldaker v. Goldney* (Feb. 20, 1834, 12, S. 468); *Forrester* (July 15, 1844, 6 D. 1358); *Walker* (Dec. 7, 1844, 17 Jurist, 87); *Shaw* (March 1, 1851, 13 D. 819), and *Christian* (June 14, 1851, 13 D. 1149). The Court were unanimous in the case of *Edmondstone*, where there was no doubt of the husband being throughout a domiciled Scotchman. It seems, further, that they would have unanimously sustained the jurisdiction in the case of *Levitt* had the proof in that case established the fact that the husband was at the time of the raising of the action truly domiciled in Scotland. But the principle that anything short of a true domicile could furnish ground of jurisdiction, was ultimately admitted only by a narrow majority. And so far as these decisions go beyond this—that the husband being truly domiciled in Scotland the Scotch Courts have jurisdiction—it is impossible to attach much weight to them. None of the decisions were appealed from, and it is difficult to resist the impression that the parties were in some of the cases only too well satisfied with the judgments. Of the numerous cases in which jurisdiction has been sustained in accordance with these judgments, I know only of two (besides the case of *Lolly*) which have been subsequently scrutinised by a Court in England. In these two cases, in both of which a claim to English property depended on the validity of the divorce, the clearest evidence was obtained that the decrees in the Scotch Courts had been obtained by collusion between the parties (*Dolphin v. Robins*, 7 Cl. H. of L. p. 390, 3 Macqueen, p. 563; *Shaw v. Gould*, Law Rep., 3 H. of L. 55). It remains to be considered whether the more lax practice admitted by the Court in Scotland on the authority of the above decisions is consistent with the doctrines which have been laid down by the higher authority of the House of Lords.

But I shall first note that the Court of Session had reached the limit of their readiness to assist English parties who wished to evade the conditions fixed upon them by the institutions of their own country. In the case of *Allison v. Catley*, where parties were English both by birth and domicile, the Court refused to entertain an action of divorce, on the ground that the pursuer had already, by obtaining a decree for separation *a mensâ et thoro* from the Courts in England, obtained all the redress to which the laws of his own country entitled him (1 D. 1025). In the case of *Ringer v. Churchill* (Jan. 15, 1840, 2 D. 307), the parties were English both by birth and domicile, were married in England, and lived in England for many years after their marriage. The husband, after coming to Scotland, and residing there *forty days*,

raised an action of divorce against the wife, on the ground of adultery alleged to have been committed in France and Belgium. It was stated that the wife had received personal intimation of the process. As soon as the action had been raised the pursuer returned to England. The Court *by a majority* held that they had no jurisdiction to entertain the action; and that in such a case jurisdiction could not be prorogated by the defender stating defences on the merits without objecting to the jurisdiction. Opinions to this effect were given by the Lord President (Hope), Lords Gillies, M'Kenzie, Fullerton, Jeffrey, Cockburn, Medwyn, Moncreiff, Cunningham, and Murray. But the Lord Justice-Clerk (Boyle) and Lord Meadowbank, were in favour of sustaining the jurisdiction, holding it settled by the former cases that the Scottish Courts have jurisdiction to divorce *when a formal domicile has been acquired by temporary residence*, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had; and that the husband having acquired this *formal domicile* by temporary residence, the same must be the domicile of the wife, on the ground of Stair's dictum, that "her abode and domicile followeth his." In the case of *Bennie v. Bennie* (June 30, 1849, 11 D. 1211), when both the husband's domicile and the *locus* of the alleged fault were in Ireland, but the wife, who was originally a Scotchwoman, had returned to Scotland *animo remanendi*, the Court refused to sustain their jurisdiction in an action for divorce at the instance of the husband.

I will now take up the course of decision upon this subject in the House of Lords, keeping in view the contemporaneous state of opinion amongst eminent English lawyers which inevitably and, in a class of cases such as the present, I think rightly, asserts its influence in the deliberations of that supreme tribunal. I have already (p. 538 *ante*) adverted to the case of *Tovey v. Lindsay*, where Lord Eldon remitted the case to the Court of Session for reconsideration. He *doubted* the conclusion at which they had arrived—first, on the ground that the marriage was an English marriage; and secondly, on the ground that the husband, though Scotch by domicile of origin, appears to have become at one time domiciled in England, and was not shown to have abandoned that domicile (*Tovey v. Lindsay*, 1 Dow. Ap., 117). The case of *Tovey v. Lindsay* occurred shortly after *Lolly's* case. Both these came, in order of time, after the case of *Utterton v. Tewsh*, and before all the rest of the series,—*Edmonstone*, *Forbes*, and the rest. The marriage in *Tovey's* case was dissolved by death before a final decision; but it was owing to the remit having been made in that case that the question was agitated afresh in the cases of *Edmonstone*, etc. It was at one time maintained by some English lawyers, on the authority of *Lolly's* case, that the mere fact of the marriage being celebrated in England imports into the contract the element of indissolubility. But this notion was repudiated by Dr Lushington in the case of *Conway v. Beazley* (3 Hagg. 369), and was finally demolished by Lord Brougham in the case of *Warrender* (2

Shaw and M'Lean, 154). Nor in this last case did the circumstance of the wife being an Englishwoman up to the time of the marriage, prevent the husband, a domiciled Scotchman, from obtaining in the Scotch Court a decree of divorce against her. The maxim that "her domicile followeth his," was held good, notwithstanding that the wife was residing abroad under a contract of separation. But the husband, Scotch by domicile of origin, had throughout maintained his Scotch domicile, and this fact was strongly relied upon in giving judgment, both by Lord Brougham and by Lord Lyndhurst. It is true that Lord Brougham expressed his opinion that by the uniform and long-established practice of the Scotch Courts, these Courts have jurisdiction to divorce when a *formal domicile* has been acquired by temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had. But I do not find that this part of his opinion has in later cases had much weight assigned to it.

But on the question whether true domicile in Scotland is essential to constitute jurisdiction for divorce, all doubt is removed by the course taken by counsel, with the full approbation of the learned lords present, in the case of *Pitt v. Pitt*, 4 Macqueen, 627 (see p. 544 vol. 13. *Ante*). By that case it was clearly established that where parties are English by birth and by domicile at the time of marriage, nothing short of a true domicile acquired by the husband *bond fide*, and not for the purposes of the suit merely, can give the Scotch Court jurisdiction to entertain an action for Divorce. It does not necessarily follow that the Lords would have sustained the jurisdiction even had they been satisfied that the husband had acquired a true domicile in Scotland before the raising of the action. But this is almost implied, and in the case of *Tulloch v. Tulloch* (23 D. 639), the Second Division of the Court of Session unanimously sustained their jurisdiction on the ground that the husband (who was pursuer) was domiciled in Scotland when the summons was libelled, although he was married in Australia, and his domicile of origin appears to have been in England.

The cases of *Dolphin v. Robins* (7 Cl. H. of L. p. 390), and of *Shaw v. Gould* (Law Rep., 3 H. of L. 55) establish no more than this—that a decree of the Courts in Scotland obtained by collusion of the parties, cannot be recognised to any effect by an English judicial tribunal. I note here an observation of Lord Colonsay in the case last mentioned. He puts the case of parties resorting to Scotland with no view of evading the law of their own country, and being resident there for a considerable time, though not so as to change the domicile for all purposes, then, that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the Court in Scotland, where the witnesses reside and where his own duties detain him, and that he proves his case and obtains a divorce. In such a case Lord Colonsay would hold the decree unquestionably good in Scotland, and he would be slow to think such a decree would be ignored in the Courts in England. The

case so put would undoubtedly be a strong one. But it remains to be seen how the Court of Appeal would deal with it if it should arise and go before them. I cannot think that the Court of Appeal would hold itself bound by a series of decisions, however long, in the Court below, pronounced not without warning that a different principle might be maintained in the Court of Appeal, and acquiesced in, perhaps only too readily, by the parties. At all events, unless domicile give the rule, it will be a hopeless task to search for a guiding principle for determining jurisdiction in questions of divorce. The place of celebration has been held of no consequence (*Conway v. Beasley*, 8 Hagg. 642; *Warrender v. Warrender*, 2 Shaw & M'Lean 154; *Geils v. Geils*, 1 Macqueen 255). The *locus delicti* has been stated by five Judges out of nine (the two Divisions of the Court of Session) to be absolutely immaterial (*Jack v. Jack*, 24 D. 474, etc.). The *forty days'* residence, which at one time was much relied on in the Court of Session, is a ground on which a Judge would scarcely now venture to assert jurisdiction in cases of Divorce (*Ringer v. Churchill*, 2 D. 307). It remains to consider a certain imagined ground of jurisdiction, sometimes expressed by the specious terms *matrimonial domicile* or *domicile of marriage*, on which some of the Judges in the Court of Session have at times laid considerable stress.

The term *matrimonial domicile* has been used to express the domicile which parties contemplate at the time of their marriage. In this sense the phrase is used by Mr Fraser (Personal Relations, p. 695), and there can be no objection to such a use, except that this domicile ought not to be considered as a distinct species of domicile. It is nothing more nor less than the true domicile of the husband at the time of the marriage. For here the maxim that the wife's domicile follows his, applies (*Geils v. Geils*, 1 Macq., 259). In the same sense the expression *matrimonial domicile* is used by Lord Cockburn in the case of *Shields v. Shields* (15 D. 147). It is in the case of *Jack v. Jack* (February 7, 1862, 24 D. 467) that the expression *matrimonial domicile*, in the sense now animadverted upon, first occurs in the opinions from the bench. In this case the husband was Scotch by birth, and was resident and domiciled in Scotland at the time of his marriage on the 18th of June, 1853. He continued to reside in Scotland until the 21st of July, 1855, when he went to the United States, leaving his wife in Scotland. From that date until the raising of the action, in which he was pursuer, he remained in America, and his wife remained in Scotland. He alleged that he had left Scotland in consequence of the disgraceful conduct of his wife, and that he had no present intention of returning there. She alleged that he had deserted her. The Court sustained the jurisdiction, most of the Judges resting their decision on the ground that the "domicile of the married pair as such"—the "*matrimonial domicile*"—the "*domicile of the marriage*" was in Scotland. But Lord Kinloch and Lord Jerviswoode rested their decision on the ground that the true domicile of the pursuer continued to be in Scotland. And I think rightly. He could not have acquired a domi-

cile in America. For having intentionally left his wife behind him in Scotland, how could he be said to have taken up an abode for *himself and his family* in America? The case of *Hook v. Hook*, February 7, 1862 (24 D. 488), was somewhat similar. Here a proof was allowed of the averments as to the jurisdiction. It appeared that the husband's domicile of origin was Scotch, and that at the date of the marriage both parties were domiciled in Scotland. They lived in Scotland for some time after the marriage. In 1850 they separated, having entered into a deed of separation. In 1852, the husband returned to his regiment, and after living abroad with the regiment, in 1860 raised an action of divorce, and shortly afterwards returned to Scotland. Here again the jurisdiction was sustained. The Lord Justice-Clerk (Ingليس) said, "The *matrimonial domicile* of the spouses was in Scotland at the date of the separation in 1850, and it seems to me that if the separation were at an end, and the spouses were to come together again, the place of the re-union would most naturally be Scotland." But the same end would have been arrived at more directly by showing that the *true* domicile continued to be in Scotland, which clearly was the case. Since the husband's domicile of origin was in Scotland it was not lost. For by the same reasoning as in the last case, it could be shown that no new domicile of habitation can have been taken up. Another case in this class is that of *Hume v. Hume* (July 15, 1862, 24 D. 1342). Here, too, a proof had been allowed. The action was at the instance of a wife against her husband. They had been married in Scotland, had lived there for several years, and children had been born there of the marriage. The husband had left his wife and family in Scotland, and gone to America with a female, with whom he there lived in adultery. The decision in this case followed that in the case of *Jack* above cited. It is abundantly clear that here also the true domicile of the husband was in Scotland. He certainly did not acquire a domicile in America. And even had Scotland not been the country of his original domicile, there would have been ground for holding the Scotch domicile to have been retained. The law would not easily presume that he had abandoned *animo* the home where his wife and family by his own disposition and consent remained.

This train of cases (*Shields*, *Jack*, *Hook*, and *Hume*) are all consistent with and support the position that the Courts of the country of domicile give the sole and exclusive *forum* having jurisdiction in cases of divorce. The same *ratio decidendi* applies where the action is at the instance of the wife (*Buchanan v. Downie*, Nov. 18, 1837, 16, sec. 82; *Scott v. Scott*, Jan. 20, 1859, 21 D. 285).

If we now survey the whole series of cases where jurisdiction for divorce has been canvassed, we find one feature constant and uniform. The party on whom the *onus* lies of showing that the Court has jurisdiction, invariably strives to establish the fact that the true domicile of the husband is in Scotland, and the Judges, however prone to accept less satisfactory grounds in lieu of the true domicile, always give their

first consideration to this—*French v. Pilcher*, June 13, 1800, 12 F. C., 421; *Orde v. Orde*, 8, sec. 49; *Bennie v. Bennie*, 11 D. 1211; *Shaw v. Shaw*, 13 D. 819). In the Court of ultimate appeal there has throughout been a steady current of opinion tending towards the course now clearly established by the case of *Pitt v. Pitt*. The rule that I take to be established by that case is this:—*In actions for Divorce, where there has been no previous judicial separation, the true domicile of the husband, at the time of the institution of the suit or action, is the sole criterion of the Court's jurisdiction.*

I have inserted the proviso, "where there has been no judicial separation," because a judicial separation must necessarily avoid the presumption of law that the abode or domicile of the wife follows that of the husband (*Allison v. Catley*, 1 D. 1027). It is, however, unprofitable to speculate what rule of jurisdiction would be held to prevail in the exceptional case suggested by this proviso.

There is, in Scotch procedure, one action for Divorce which here requires special notice, namely, that which formerly proceeded upon the ground of a decree of Adherence, and contumacy on the part of the defender. It is now, by the Conjugal Rights (Scotland) Amendment Act 1861, sec. 11, made unnecessary to go through the whole of the preliminary process; but the cause of the action, namely, *wilful desertion, obstinately persisted in for more than four years*, remains the same as before. There can be no doubt that a wife, being domiciled with her husband in Scotland, and there deserted by him, and remaining there during the whole time that her husband is proved to have remained absent and obstinately persisted in his desertion (such time being sufficient by law to entitle her to the remedy), is entitled to have her remedy from the Court in Scotland. (*Jack v. Jack*, 24 D. 476). And if a wife were brought by her husband to Scotland, and there deserted by him, and there remained for such period as before mentioned, without any other home having been provided for her by the arrangement and disposition of her husband, it is probable the Courts here would give her the same remedy. But it is otherwise if the husband has no domicile in Scotland, and the desertion did not take place in Scotland. The wife cannot then claim the assistance of the Scotch Court on the ground that her own domicile is in Scotland, or that the marriage took place there. (*A. B. v. C. D.*, 7 D. 556; *Gordon v. Gordon*, 9 D. 1293). Of course, in an action of this kind, where the ground is wilful and persistent desertion, no kind of formal citation can supply the want of proof that the dependence of the process has been actually brought to the knowledge of the defender, if it is possible to find him. When the decree of adherence had been once obtained under the old practice, the action of divorce might proceed upon edictal citation. (*Smith v. Smith*, 16 D. 544.) But I presume that in an action for Divorce upon this ground now, no proof of actual intimation would be dispensed with which would have been necessary in the old process of Adherence. (*Turnbull*, July 18, 1840; *Black*, Feb. 4, 1852, referred to in L. O.'s note, 16 D. 545).

With regard to the Consistorial actions other than that for Divorce, the mass of authorities as to the *forum competens* is not so great. The temptation improperly to resort to the Scotch tribunals has been less. In order to discover a principle upon which the proper *forum* in these actions depends, it will be convenient to divide them into two classes:—The first class may be called *declaratory Consistorial Actions*, and comprise Declarator of Marriage, Declarator of Nullity of Marriage, Declarator of Legitimacy or Bastardy, and the Action of Putting to Silence. These, along with the action for Divorce, are sometimes called Actions of *Status*. For they are the actions by which a personal *status* is declared and, if properly instituted and carried through, generally affect the personal *status* in other countries as well as in the country by whose Courts the *status* is declared. What is meant when an action of *status* is spoken of appears to be this:—In consequence of a certain relationship recognised by law as based upon marriage, I am invested with a certain set of rights and capacities, which set of rights and capacities may properly be said to constitute a personal *status*. Now, when we speak of rights or capacities we tacitly refer to some particular political society by whose laws these rights and capacities are recognised and protected. If that political society be, for instance, France, we express the whole notion by saying that I enjoy in France the *status* of husband, lawful son, etc. Now, a person may enjoy in France the *status* of husband, son, etc., although the facts of his personal history are not such as would, by the laws of France, have supported that *status*. And this is received *ex comitate gentium*; for it is considered that for a person to enjoy in France the *status* of husband, son, etc., on the ground that he enjoys the *status* of husband, son, etc., in the country of his domicile, is upon the whole a smaller inconvenience than that the Courts of France should pronounce upon and execute the legal consequences which the facts of his personal history would infer according to the domestic laws of France.—The second class of the actions here discussed may be called *dispositive Consistorial actions*, and include actions of Separation *a mensa et thoro*, actions of Adherence (considered apart from their effect as preliminary to an action for Divorce), and actions of Aliment between husband and wife.

Now as to *declaratory* Consistorial actions; it would seem that where the validity of an alleged marriage between the parties in question, the proper *forum* is that of the domicile of the alleged husband. For the allegation of marriage which is sought to be affirmed or impugned, involves in itself the proposition that the domicile of the alleged husband is the domicile of both. Whether the *locus contractus*, combined with personal citation of the defender within the territory, will give jurisdiction to the Scotch Courts in a declarator of marriage, although the alleged husband has not his true domicile within Scotland, is a question of which the affirmative seems to have been held in the case of *M'Kenzie*, March 8, 1810, 15 F. C. 613. And if this question should be answered in

the negative, it is very remarkable that the Judges did not in the *Yelverton* case (1 M'Ph., 161; 4 M'Queen, 745; 3 M'Ph., 645) deem it *pars curiæ* to direct inquiry as to the domicile. The question was not in this case directly raised or adjudicated upon, and the objection, when subsequently raised, seems to have been, by one at least of the Judges, deemed relevant to infer nullity in the whole proceedings of the principal case (*Longworth v. Yelverton*, 7 M'Ph., 70). And it may be questioned whether the tendency of authority in the Court of Appeal in favour of exclusive jurisdiction by the Courts of the domicile, may not ultimately be extended to this class of cases. It might be found extremely inconvenient that the Courts of England and Scotland should possess a concurrent jurisdiction to pronounce a decree purporting to declare a *status*. The Court in Scotland might declare a marriage, and that in England might declare nullity of marriage between the same persons, the Court in either country having meanwhile no judicial cognizance of the proceedings in the other. Each decree must then be good in either for both countries, or for one country only. And either consequence would be absurd. For on the former hypothesis, all the lieges would be puzzled by two inconsistent commands. On the latter hypothesis, persons on this side the border are commanded to treat the alleged marriage as good, and persons on the other side to treat it as a nullity. And a person living on one side of the border, and having effects on the other, would be laid under two inconsistent obligations.

If, therefore, the function purported to be exercised by our Courts in their declaratory Consistorial jurisdiction be not absurd and futile, it seems necessary that the jurisdiction so assumed should be, so far as possible, exclusive of any other jurisdiction within the kingdom. And if there be one criterion in such cases to point out the Court whose jurisdiction is to be sole and exclusive, it is clear, both on principle and authority, that the criterion is afforded by domicile. Domicile of the husband, or the person alleged or claiming to be husband, in cases where marriage itself is to be declared or annulled. In other cases, *domicile* of the person whose *status* is in question. It may be here observed that even when a given personal *status* is established in both countries, the *whole* set of rights and capacities of which that *status* consists, is not necessarily identical in the two countries. Thus, a person born of parents domiciled in Scotland at the time of his birth, and of their subsequent marriage, would enjoy the personal *status* of legitimacy in both countries, and would undoubtedly have a good cause of action in either country against any one who, to his injury, spoke or wrote so as to affix upon him in unqualified terms the stigma of bastardy. Yet he could not inherit land in England as lawful heir to his father. For the conflict of jurisdiction between the Ecclesiastical and Civil Courts in England had early led English lawyers to distinguish between the personal *status* of legitimacy (as opposed to bastardy in the sense understood in the Ecclesiastical Courts), and the qualifications for inheriting land which,

according to the common law of the realm, required the further condition that the claimant should have been born *in lawful wedlock*. This conflict was the occasion of the memorable statute of Merton (20 Henry III., c. 9), which runs thus:—

“To the King’s writ of bastardy, whether any one born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not nor could not make answer to that writ, because it was against the common order of the church; and all the bishops instanted the lords that they would consent that all such as were born afore matrimony should be legitimate as well as they that be born after matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate; and all the earls and barons with one voice answered that they would not change the laws of the realm which hitherto have been used and approved (*quod nolunt leges Angliæ mutare quæ huc usque usitate sunt et approbate*).” So that when in recent times the effect of a Scotch *legitimatio per subsequens matrimonium* upon inheritance to English real estate came to be discussed, the case was found to be already provided for by the ancient laws of the realm (*Doe dem Birtwhistle v. Vardill*, July and August, 1840, 1 West 500).

In the dispositive Consistorial actions, on the other hand, the criteria of jurisdiction must be different. There is no room here for the fiction that the abode of the wife follows that of the husband; for the object of the actions is immediate relief from the ordinary legal consequences of the actual situation. In all these cases the Court must have a discretionary power in assuming jurisdiction. The limit of that discretion can only be confined by its power to carry into effect the relief given; and there seems no reason why in any of these cases the Court should hesitate to exercise jurisdiction, if there are grounds of jurisdiction which would have availed in any other action founded on delict. Such would be the effect of the cases already referred to as decided by the Court of Session, and there can be no reason to suppose that in cases of this nature a different rule would be introduced by the Court of Appeal. The requisites for due citation in consistorial actions are laid down by the “Conjugal Rights Scotland Amendment Act 1861” (24 & 25 Vict., c. 86, sec. 10), amended by the Court of Session (Scotland) Act, 1868, (31 & 32 Vict., c. 100, § 100.)

R. C.

GLASGOW SHERIFF COURT REFORM.

THE Glasgow Faculty of Procurators are setting their house in order. They lately appointed a Committee “to inquire into the present state of business in the Sheriff Court at Glasgow, and the arrangements for conducting the same.” It is already not unknown that there exist in Glasgow various peculiarities in the mode of conducting business, which,

though necessitated by the circumstances of that great community, really amount to infractions of the statute, and that certain abuses demand a speedy remedy. It is to be expected that inquiries such as that which the procurators have now instituted will bring others to light; and some will no doubt be ready to allege that nearly as strong a case has been made by its own ministers against Glasgow justice as Lord Ormisdale made against the Edinburgh commodity which passes by the same name. We, however, have always deprecated comparisons which may tend to aggravate the needless jealousy between the east and west which is sometimes exhibited; and on the present occasion we rejoice to welcome a report framed in the wisest and most temperate spirit, full of frank exposition of felt evils, and honest endeavour after improvement. Our present task is the easy one of extracting some of the most important passages, which we trust may tend to the edification of many others than Glasgow lawyers.

In regard to the preparation of records and the matter of proofs, nothing is said requiring notice. The main question dealt with is the delay which occurs in the taking of proofs and the inevitable multiplication of diets under the present system. Much light is thrown on the nature of Glasgow business by such a passage as the following:—

“The need for repeated diets arises in various ways. Sometimes you are obliged to take a shorter diet than you need to enable the Sheriff to economise odd hours of his free time, and sometime agents are to blame for too easily consenting to supersede a diet. Very frequently another diet is required because certain witnesses have not attended, or, after attending and long waiting, have gone away. This it is impracticable, in a place like Glasgow, and in a large class of cases, to prevent. Mercantile men cited as witnesses are often unable, without the most serious inconvenience and loss, to make their engagements suit the diet. They are from home when the diet comes on, or their stated market—as peremptory as a diet of proof—or some unforeseen emergency, keeps them away. Or they attend expecting to get their examination over in a few minutes—all they have to say could be said in a few minutes—and they are often kept hours on hours. In many cases citation, and still more second diligence, would be suicidal to the party applying compulsion to bring the witness to the diet. Imagine how it would work with witnesses by whom you want to prove a usage of trade, or from whom you wish their opinions as experts. Imagine a broker forcing his principal constituent unwillingly to a diet that doesn't concern him, on a mail day, or a merchant applying for second diligence against his banker. In nine cases out of ten the party would prefer to lose his case. Practically, it would work injustice to refuse another diet in these cases. Then it is often equally impracticable—especially when the record gives no details—for a defender to anticipate special matters that come out in his opponent's proof, or to be ready with precise proof to meet them. However desirable it would be for both parties always to finish in a day, it would, from your Committee's experience, produce great injustice in a large number of cases, to attempt rigidly to enforce that as a rule in Glasgow. Certainly the pursuer might generally exhaust his proof in chief at the first diet; and a great part of defender's proof in chief, and some portions of his conjunct proof, might also be led at the same diet.

“It is evident to your Committee that renewals of diets are, and always must be, to some extent unavoidable. But it must be confessed that the time at diets is not always properly utilised. A clear perception by the agent leading proof of what it is sufficient to get from the witnesses for the purposes of his case,

and avoidance by the other agent of random cross-examination, hazarded without definite purpose, or, what is worse, mere idle re-examination over ground already traversed, would save much time now wasted at diets. The Judge ought, but is naturally reluctant, to interpose. The remedy lies in the Agent's own sense of what is proper."

The Committee suggest a re-arrangement by the Sheriff of the business to be done by the Sheriff-Substitute. They say—

"One of the present Substitutes might be detached; or if that be impracticable, another Sheriff-Substitute must be appointed to relieve the Substitutes who are to deal with the ordinary cases, of the miscellaneous work. A great part of this work it is really waste, not only of time, but of talent and energy which can ill be spared, to subject a Judge of high quality and capability to the drudgery of performing. This Substitute should take exclusive charge of the Fiscal's work (except jury trials)—of pauper applications—of summary ejectments, and other summary procedure under special statutes of—*fuga* petitions, lawburrows, initiatory warrants in interdicts—and of other incidental and miscellaneous business, and of the Certain Debts cases. Perhaps he might be able occasionally to take the Small Debt Court. In this way the time of the other Sheriff-Substitutes would be left free to a very great extent for diets of proof and for advising."

The second suggestion is that proofs should be taken by shorthand, in the option of parties up to £50, and necessarily where the value of the cause exceeds that amount. This, of course, requires an Act of Parliament. The suggestion is so obviously sensible that it needs no argument in its support. The proposal as to re-arrangement of the Sheriff-Substitute's work in the manner proposed is certainly open to objections, and, we imagine, will not be acceptable to the Judges themselves; but we think that some plan might be contrived for preventing the interruptions complained of. The third suggestion for a temporary restoration of the system of taking proofs by commission in order to work off the accumulated arrears in the Glasgow Sheriff Court, is a remarkable testimony to the extent of the evil for which a remedy is sought; but we cannot, without a more precise knowledge of the facts than is presented in the report, judge of the propriety of adopting it.

The last subject dealt with is the great delays which take place in the advising of cases. The passage which deals with this subject deserves the candid attention of every lawyer, and we therefore give it in full. We are very happy to read so able and so strong a disclaimer of the opinion to which Glasgow lawyers have sometimes been supposed to lean, in favour of that "raw haste" which is "half sister to delay." With regard to advisings on the merits, the Committee report that

"Very strong complaints are made by the profession. It is difficult to see how this cause of complaint can be remedied otherwise than by securing for those of the Judges whose time is really over-occupied with proofs and other business that amount of leisure which they need for advising. One at least of the Sheriff-Substitutes, your Committee understand, is compelled by the distraction of the business in Chambers, and by the pressure of enormous arrears left by his predecessor, to perform the heavy work of advising and drafting judg-

ments entirely at home. But in other cases there are no arrears and no over-pressure. Still, even if a Judge had ample leisure, it is not possible to interfere—as has been suggested—by legislation prescribing what time in every case a Judge shall be allowed for preparing his judgment. Time really necessary for and also really occupied in mature deliberation at this stage of the case, is not lost if it issues—as it ought—in reducing the case, for the first time, into shape, by clear articulate presentment of all its points and of the reasons of judgment. It is hopeless, by means of any mechanical contrivance, to force, and mischievous for Judges to be put under temptation of affecting, despatch. 'Affected despatch,' says Bacon, 'is one of the most dangerous things to business: it is like that which physicians call pre-digestion or hasty digestion, which is sure to fill the body full of crudities and the secret seeds of diseases.' And nowhere is factitious or simulated despatch, leading to perfunctory judgment, or—what also is not without example—perfunctory judgment without despatch, more pregnant with secret seeds of mischief than in the first interlocutor on the merits. The parties and the Court of Appeal are entitled to expect from the Judge who has prepared the record, and examined the witnesses, and has been acquainted with the case from the first, some fruit of the advantage which he has over any appellate Judge in the facility with which he might marshal the facts and eliminate the cardinal points of law on which the decision must turn. A judgment at this stage, if crude and inexplicate, is, whether right or wrong in its result, almost equally the source of mischief. If right, it does not convince the loser, nor carry credit with it in the Appeal Court. The appellant cannot say, 'I admit all the findings but this;' and then direct the strength of his argument to the point which he disputes; and the gainer cannot support it without repleading the whole case before a Judge quite new to the case, within the limited time which is all the Appeal Court can afford. Hence risk of miscarriage in the Appeal Court; and then—the Court of Session. If the Substitute's interlocutor is wrong, even if it should be set right on Appeal, the unsuccessful party is tempted—perhaps by the general reputation of the Substitute—to balance the possible but unknown reasons which he, with his knowledge of the case from the first, may have had against the contrary reasons of the Judge of Appeal, who, it is supposed, cannot have known the case so thoroughly; and then—the Court of Session again. It cannot, therefore, be the object of the profession only to see Judges 'come speedily off for the time, or contriving false methods of business that they may seem men of despatch.'"

The Committee, while warmly approving of a mature and deliberate sifting of each case by the Judge, do, however, complain that delay takes place which is not always to be accounted for by overwork, and which can only be remedied by giving all the Substitutes more time through the adoption of some of the suggestions which they make.

THE SONG OF THE REPORTER.

[AFTER HOOD.]

With fingers weary and worn,
 With wig askew on his head,
 A Reporter sat, at his lonely work,
 Plying his cedar and lead—
 Write! write! write!
 In his Desk by the side of the Court,
 And thus he bemoan'd the pitiful plight
 Of him who is doomed to report.

“ Write! write! write!
 While ten o'clock strikes from the Tron!
 And write—write—write,
 When all but the Macers are gone!
 It's oh! I am a slave,
 Though many's the case that I burke,
 'Twill bring me to an untimely grave
 This hang'd reporting work!

“ Write—write—write,
 Till the brain begins to reel;
 Write—write—write,
 Till the fingers are stiff as steel!
 All night at opinions I toil,
 The President—Deas, there's no slurring,
 But over Ardmillan I fall asleep,
 And put down Kinloch as concurring!

“ Write—write—write!
 It's manual labour sheer!
 And what is my screw? It's sad but true,
 Scarce a hundred a year!
 A hundred a year, and paper to find—
 And pencils too are so dear!
 I've no balance in Bank; I tell you frank—
 And so would the cashier!

“ Write—write—write!
 Case after weary case,
 Write—write—write—
 They go at a fearful pace!
 Rule, Reduction, and Issue,
 Issue, Reduction, and Rule,
 Till my hand is stiff, and my pencil done,
 And my Note-Book almost full.

“ Write—write—write
 In the dull December light,
 And write—write—write
 When the July sun shines bright—
 While from the Outer House,
 The distant laugh I hear;
 They've gossip and fun, from Ten to One,
 Then Lunch and disappear.

“ Oh! but to pace the House,
 And be talked to of one's own suits—
 With eager Agents by your side,
 And the boards beneath your Boots—
 For only one short hour
 To feel as I used to feel,
 Before I dreamt what 'advising' meant,
 Or Broun could tell from M'Neill!

“ Oh! if for one short hour!
 To the Court I could close my ears!
 No blessed leisure for books or chaff,
 But time to work up my arrears!

This wretched rhyme has eased my heart,—
 But hush! What's that they said?
 My lines must stop, for fear I drop,
 This hazy judgment's thread."

With fingers weary and worn,
 With wig askew on his head,
 The Reporter sat, at his lonely work,
 Plying his cedar and lead—
 Write! Write! Write!
 In his Desk by the side of the Court,
 And still with a groan he tried to quench,
 For fear its tone should reach the Bench,
 He mourn'd their woes who report.

Review.

Erskine's Principles of the Law of Scotland. A New Edition. By
 WILLIAM GUTHRIE, Esq., Advocate. Edinburgh: Bell & Bradfute.
 1870.

THE singular excellence of *Erskine's Principles* as a text-book of the law of Scotland has been shown in no way more conclusively than by the large number of editions through which they have passed. Most of these editions possessed no other value than a text of the work itself more or less pure. Professor More's edition was the first real attempt to exhibit the changes in the law which had taken place since Erskine wrote, and, like all the Professor's work, it was carefully executed; but the course of legislation and decision have now left it far behind. Mr Guthrie Smith's edition in 1860 lost much of its value from the liberties which were taken with the text. We have now to notice another edition by Mr Guthrie, advocate, which we have no hesitation in pronouncing by far the most valuable which has yet appeared.

Mr Guthrie's task in preparing this edition was a somewhat peculiar one, but he has brought it to a most successful issue. The profession will remember the high expectations which were formed when, in 1864, Mr George Moir, advocate, was appointed to the Chair of Scots Law in the University of Edinburgh, not only from his high attainments as a lawyer, but from the elegance of his scholarship and the singular precision and literary taste which characterised his pleadings, both written and oral. It was thought that he might even aspire to rival in some degree the distinction of his great predecessor Erskine himself, whose works are no less admirable for learning and weighty reasoning than for graceful diction. These expectations were being amply fulfilled when, to the regret of all, Mr Moir resigned his chair, after having lectured for two sessions only. Those who had heard these lectures spoke of them in the highest terms, and a general desire was expressed that they should be given

to the public. To a considerable extent, we rejoice to say, this wish has been gratified by Mr Guthrie; for the lectures having been placed at his disposal for this edition of Erskine, he has thrown a large portion of them into the shape of foot notes. On those departments of the law which have been developed and, in some cases, almost created since the text was written, he has given the views of Mr Moir in a condensed but continuous shape as supplementary notes on such subjects as the Poor Laws, the Law of Master and Servant, the Law of Trusts, Reparation, Bankruptcy, Stoppage *in transitu*, Joint-Stock Companies, Contracts of Affreightment and Insurance. These would of themselves have made this edition very valuable.

But it must not be supposed that Mr Guthrie's labours have been confined to interleaving Erskine with Moir. He has in the first place given a perfectly pure text of Erskine himself, and he has in elaborate foot notes, replete with case and statute lore, brought down the law to the present time. One cannot help being struck with the singularly complete way in which he has caught Erskine's spirit in the selection he has made of the points for elucidation, and the manner in which he has dealt with them. The object of author and editor alike was to ascertain *principles*, not mere crude legal facts, to state them concisely and clearly, and to illustrate, not to overlay, them with cases. This is far more difficult work than to string together decisions taken chronologically from a Digest, the great snare of modern law writers. But its successful accomplishment is well worth the labour bestowed on it; and on the present occasion it enables us to say that as edited by Mr Guthrie, *Erskine's Principles* are once again, what they were when first published, by far the best text book for students which the law of Scotland possesses, and for the legal practitioner as clear a compendium and as safe a guide as the great bulk and complexity of our law now permits.

J. B. N.

The Month.

Rules of Professional Etiquette.—Inquiries have reached us at various times as to the rules which govern the mode of communication between counsel and client, and the necessity for the intervention of an Edinburgh agent. There seems to be some misapprehension, or at least a want of definite information, on this subject. We understand the rule to be, that the intervention of an agent is necessary only where there is actually litigation. In England it has been laid down by the highest authority that in criminal cases the counsel for the accused may take his instructions directly from his client; but in Scotland, where the law has provided anxiously for the defence of accused persons by both agent and counsel, it is more than doubtful whether such a practice is admissible, unless under the express sanction,

or rather direction, of the Court. Certainly it is not generally adopted by reputable members of the profession. In civil matters, it is needless to say, no counsel appears in any Court or prepares a pleading of any description, unless he is instructed to do so by an agent entitled to practise in the Court to which the retainer applies. The doubts that have been suggested relate to the large field in which the services of the bar are required for other purposes than advocacy. There is, however, no rule of professional etiquette which forbids counsel to hold consultations with any one of the public who seeks his guidance, to draw papers of any kind (except pleadings) on the direct instructions of his client, or even we imagine to conduct a case before an arbiter without the intervention of an agent. In the majority of cases expediency requires that the case to be submitted to counsel shall be sifted and prepared by an agent, who has easier access to the original sources of information, whose vocation, indeed, it is to investigate them, and who may be presumed to be able to present the question to be solved in a more simple and intelligible form than the party interested could possibly do. When it is desired to have the advice of counsel of very high standing, the employment of an agent in town or country for this purpose is practically indispensable, and in any case where the client can afford it, he will be much the better of having his case stated by an experienced agent.

Cheap Opinions.—There is a large class of cases in which a deliberate and carefully considered opinion of counsel would be of great value to the client, and would materially lighten the responsibility of his local lawyer, if it could be had at a reasonable cost. It does not seem to have occurred either to the profession in the country or to the public in general, that many members of the bar might, with some public advantage, be employed to give opinions, to draw deeds, etc., for fees much lower than those which are paid to the leaders of the bar; *e.g.*, to give (as is frequently done in England) guinea opinions. It will be said that such opinions would not in general be worth the money. But this objection may be easily answered. In the first place, it is founded on that ignorance of the qualifications of the general run of advocates, which necessarily results from the separation which has too long existed between the bar and the profession in the country, which has led agents there to resort in crowds to some counsel who bears a great name, or who is selected by his friend the Edinburgh correspondent, and which in very truth is rapidly bringing about the destruction of the Scotch Supreme Court, by concentrating all business, in obedience to prevailing fashion, in the hands of six or seven men, and is depriving the bulk of those from whom the Judges and other legal officials of the country must be chosen, of the possibility of obtaining that efficiency which only experience gives. In the second place, in the bulk of the cases to which we refer, counsel are not consulted at all, and where they are, we submit, with the greatest possible deference, that a guinea opinion from a man who has studied his profession, who is daily watching the course of decisions and the

practice of the Court, who has only two or three such opinions in the week, and who has therefore time to apply his mind to them, to look up the authorities, and digest the facts, is, not to put the case too high, nearly as well worth having as that of an over-worked senior, which often happens to be correct, and has, of course, a certain value as the dictum of a man of great experience, and in some cases of great learning and sagacity; but which often gives the anxious inquirer no means of discovering the grounds (if any) on which it is based, or even of knowing whether the oracle has applied his mind to the matter at all. No imputation could be more groundless or uncalled for than that any counsel now in large practice gives other than an honest and conscientious opinion, and we readily grant that opinions so obtained are valuable because given by men of large and varied experience. All we urge is, that in certain cases, cheaper opinions may be got from less distinguished men who are able to give more time and pains, and that such opinions might be made available in many cases where parties are now content without any.

The Death of Lord Barcable.—Just as we are going to press, we learn with the deepest regret that this most able, accomplished, and conscientious Judge died at his house in Edinburgh on Wednesday, 23d February. Only a few months ago he was the most laborious, and one of the most trusted occupants of the judicial bench; and it is impossible to express the deep feeling of general loss which pervades the Parliament House. It cannot be doubted that his untimely end has been caused by the severity of his toil as a Judge. We hope to lay before our readers next month a more worthy notice of one of the most high-minded men who have ever adorned the bar or the bench.

Property of Married Women.—Sir Roundell Palmer presided at a meeting of the Juridical Society on Jan. 28th, at which Mr H. R. Droop read a paper on "The Property Rights of Married Women." Mr Droop did not think the bill of Mr Russell Gurney dealt in the best possible way with the difficulties of this subject, and he proposed instead that the husband should have the management of the wife's property, and of the spending of the wife's property and of the income, but not the power of alienating any of the immovables nor any property which required a deed or document to transfer it. Such property should be only dealt with by both jointly. The wife should have the power to obtain a separate right over her property as soon as the husband ceased to find for her and the family a maintenance suitable to their condition. He thought protection orders should be more readily obtainable, and that the married couple should have the power to execute by mutual consent a deed having the same effect.

Sir Roundell Palmer said that public opinion required to be more matured before any decision was arrived at. Three interests were involved in it—those of women, of families, and the external world. It by no means followed that one stereotyped system was best for all, whether rich or poor. It was a question whether, in ordinary cases, the law and the present system were not protective of and advantageous to woman on the whole. He thought it was. The wife was protected from her husband's contracts or debts, while the husband

was to a large extent bound by those of his wife. If the new law were to leave a wife thus protected, and at the same time take away all power from the husband to alienate, it would be a great change indeed. There was some force in the remark that making the wife thoroughly independent of her husband would be likely to encourage separations. In Scotland, divorces were granted where there had been desertion for four years, and attempts were being made to introduce this in England, and to diminish the length of time in Scotland. He had lately been informed of what was called a hard case of a gentleman whose wife was in the habit of deserting him annually to visit an invalid sister, and yet who could not obtain a divorce because she returned to him after each visit. He thought, however, that when the husband failed in his duty, and permitted the wife to carry on trade and to support the family, the obtaining of a protection order should be a speedy and an easy matter. He was not a believer in the power of Acts of Parliament to create public opinion. He was in favour of some law to protect the capital of married women, and that if the husband failed in his duty, there should be the simplest, shortest, and most summary method of giving the property to the wife, and of making her to all intents and purposes a *feme sole*.

Advances by Directors to Companies.—Can directors stand as creditors of the company which they manage for money advanced by them for the purpose of discharging the pressing liabilities of the company? This question Vice-Chancellor Malins has lately decided in the affirmative—*re* the International Life Assurance Company. In this case three of the directors had advanced the following amounts:—Mr Gibbs, £1,100; Mr Symes, £1,600; and Mr West, £300; and as to one case at least, that of Mr West, where affidavit was clear as to the application of the money, his Lordship had no doubt. Mr West was a creditor, and was entitled to set off the £300 against a call upon him. Substantially the same opinion is given in regard to the case of Mr Gibbs, who had paid the money "for the benefit of the company." His Lordship intimated a doubt as to whether Mr Gibbs could compete with the general creditors of the company, but as there was likely to be a surplus it was not necessary to consider that question. It seems difficult to see, however, why there should be room for this doubt, at least in the case of money really advanced to meet "pressing liabilities." The dealings of directors as trustees ought to be narrowly watched; but where the fact is established that as individuals they have lent to themselves as representing the company, they have a perfect moral claim to be considered creditors. Other creditors certainly have little cause to complain, whatever may be the interests of shareholders in subjecting to severe examination all such lendings, just as they would any other transactions in which directors have a personal interest opposed to theirs.—*Economist*.

The Stamp Acts.—The Court of Exchequer, in a Crown suit against the Royal Liver Friendly Society, has just decided a point which brings out forcibly the intricacies of the Stamp Acts. As is well known, there are special exemptions of friendly societies from stamp duties; but the Court, granting the claim of the Crown, have decided that such exemptions do not cover deeds relating to the investment of the surplus funds of such societies. They were led to this opinion by the omission of the word "security" in a later, while it was to be found in an earlier, Act, and the general notion that such Acts must be construed strictly. "The duty from which exemption was sought would not fall upon the society in the ordinary course of business, but upon the mortgagor or transferor of the mortgage.....What the legislature intended was to protect from duty in the interests of the society instruments necessarily used in the direct operation of the society as such, and not in the investment of its surplus funds." A case like this we think only shows the importance of preventing the possibility of such questions altogether. It seems a very strong thing to say that the investment of surplus funds is not a part of the business of friendly societies—one of whose most important functions, like that of other insurance companies, though

it may not be their characteristic function, is that of investment. To take into consideration, again, a speculative question as to the real bearer of the stamp duty, is doubtful work. Might not the Legislature have intended that friendly societies should get more for their money because of the borrower from them having no stamp duty to pay, while he has to pay in the case of other lenders? Stamp Acts, which derive their virtue from the stamp being necessary to the validity of Acts which may not till long afterwards become the subject of legal process, ought to be so clear that such matters should not have to be considered. People ought to have the plainest direction as to what deeds do or do not require the certificate of a stamp.—*Economist*.

The Impending Degradation of the Bar.—We heartily wish that we could divine some mode of expression which would penetrate the thick skin of lethargic indifference which seems to have overgrown the governing bodies of the Inns of Court. Unfortunately, we have done our utmost, and matters are still in their old state. That state is this:—

1. We have it upon authority that the preliminary examination in general knowledge is of very little value as a test.

2. The single examination in law, which is optional, is far too easy. Very rarely is a candidate refused a pass certificate.

When will the Bar feel sufficiently humiliated to take the matter into its own hands? At the present moment, what little action is being taken emanates from solicitors, who are in a position which peculiarly fits them to acquire an insight into the poverty of learning prevailing amongst barristers. This fact ought to be sufficient to rouse the members of the Bar to action in self-defence. But as that fails let them listen to what a highly educated portion of the press says on the subject. We recommend the following extracts from an article in the *Pall Mall Gazette* to their attentive consideration:—

"Many English questions are best understood when they are looked at from a little distance, and we should strongly advise any benchman who dislikes the notion of compulsory examinations, and who prefers to see the English Bar stand on what he regards as the solid ground of its real intrinsic merits, to ask some one who has had colonial experience what is thought of British barristers practising out of the four seas. We are very much mistaken if he would not find that almost every one in a position to form an intelligent opinion on the subject would tell him that the absence of any real test among men who are called to the bar in England lowers the character of the English Bar in the colonies beyond all calculation. Here and there, no doubt, the Colonial and the Indian Bar are well supplied, but in many instances men come out with certificates of their call who know nothing whatever of their profession, and who certainly do not give a favourable impression of it to those who are obliged to form their opinions of it from a small number of specimens. Those who know nothing at all about law, and never had the faintest intention of knowing anything about it, may, and, under the existing system occasionally do, become barristers, and make use of their right to the title in a manner which would certainly not edify those who adorned them with it. The true lesson is to be learnt nearer home. In plenty of English provincial towns barristers are settled who have no more right to be members of such a profession than they have to be clergymen. We could mention more than one case in which retail tradesmen (in defiance of all rules and by signing false statements) were called to the bar. It is indeed notorious to any one who is acquainted with the lower ranks of the profession that it has a very low rank indeed; and that what may be described as a hedge barrister is often in every way a less respectable person, morally, socially, and intellectually, than almost the worst attorney. These black sheep of the profession might all be kept out by a fence which it would cost nothing to raise and keep in repair. The same fence would at the same time keep out another kind of person who is no credit to the Bar, though he often makes a good thing of it—the noisy, fluent, uneducated man who has not, and is not capable of obtaining, any real legal knowledge at all, and who often gets a considerable share of

practice by the exercise of talents which do a great deal more harm than good to the community. It is, for obvious reasons, impossible to give illustrations under this head, but any one who doubts what we say may easily satisfy himself of the truth of it by a very short attendance at Westminster Hall, the Old Bailey, and the Middlesex Sessions. He will see and hear various men of a good deal of ability there whom it would have been most desirable to have thrown out of the profession before they had developed the coarse talent and acquired the rank experience which fill their pockets with guineas, and which continuously pervert justice and create scandal of every description."

Every member of the Bar who frequents the Courts will be able to name to himself half a dozen of these "hedge barristers," and will no doubt be able also to point out many of first-class education and ability who sigh in vain for the opportunities which the hedge barrister seizes by the mere force of his vulgarity.

Now let us see what is the writer's views concerning the prospects of the profession. He says:—

"We have no doubt that by a decided and vigorous policy the Inns of Court might put the Bar in the course of a very few years in a position which they might hold for generations. They might be able then to say to all whom it might concern, "You perceive that in point of fact we are one of the most highly educated bodies of men in the country. We are by training, and also by tradition and *esprit de corps*, the guardians of the laws of England, and of everything which is sanctioned and defended by those laws. Will you break up such an institution?" The answer would most assuredly be "No;" and we are inclined to believe that the public ought to return that answer to the question even if things remained in their present position. We do not, however, believe that they will do so—at least they will not long continue to do so if things remain as they are. They rather like the Bar than not. They would like to have an excuse for allowing it to retain its present position, but the reforming or destroying hand will descend upon it sooner or later unless that excuse is provided."

This is the common sense view of the question. To delay reform from within is to invite destruction from without. It would certainly be better to have no profession at all than one which is based on false pretences. A barrister is not necessarily either a lawyer or an advocate. The public have found it out. We hope, with the *Pall Mall*, that Parliament may step in to prevent the ruin which mismanagement is bringing upon the Bar, but it is in the last degree discreditable to a body of men possessing so large an amount of energy and real learning and ability that they should quietly subside into a subject for anatomical study by the House of Commons.—*Law Times*.

The Future Status and Education of Lawyers.—Sir Roundell Palmer has become the president of an association which has for its immediate object the establishment of a law university, and for its ultimate aim the destruction of the barrier which now divides solicitors from the Bar. We have also before us a pamphlet by Mr C. T. Saunders, attorney-at-law, entitled "The Amalgamation of the two Branches of the legal Profession, considered with a special reference to contemplated Law Reforms." These two facts indicate that a much discussed change is imminent, and that with the distribution of business in provincial Courts the arbitrary division of labour existing stands a very considerable chance of being done away with.

Before making our own comments, which will be very brief, we will ascertain what is new in Mr Saunders's paper. Having cited authorities, he comes to the conclusion that, "inasmuch as the foundations of the Inns of Court, as well as of Chancery, were laid in the same early period, the attorney had the same right of admittance thereto equally with the barrister." This he states appears in the evidence adduced before the Inns of Court Commission in 1855, from which it will be seen that as comparatively late as the last century it was the custom for practising attorneys to be admitted members of the Inns of Court. The gradually increased restrictions by means of which attorneys have now become wholly excluded are stated by the late Mr Maughan in his evidence before the same

commission. And, he adds, "The result of this exclusion, combined with the virtual autocracy of the governing bodies of the Inns, has been that from time to time stringent rules have been made in the interests—as it has no doubt been considered in the legitimate interests—of the Bar, which operate as a virtual and most unjustifiable prohibition of the great body of the attorneys from ever passing into the ranks of the Bar."

Mr Saunders' investigations into the state of things in other countries lead to the discovery of "this striking fact, that in no other civilized country but one is there any approach to such a system, and in none a counterpart to it; that in Sweden and Denmark, throughout the length and breadth of Germany in all its separate governments, in Italy, Spain, and Portugal, the functions of the attorney and advocate are combined; and that in France, the only apparent exception, the relation of the advocate to the *avocat* (who to only a partial extent occupies the position of an attorney) and to the client, differ in those points which are considered essential in our system; and more striking still, that in the vast empire of the United States, governed by English laws, filled by our own race, and holding many of our legal traditions, and in all our colonial dependencies, no such severance of the two branches of the profession exists."

The Bar will be glad to learn an attorney's view of the probable effect of amalgamation upon the profession. Mr Saunders says it would probably be thus: "There would be a greater tendency in practitioners to exclusively devote themselves to litigious or Court practice on the one hand, and to conveyancing on the other; and, in passing, I just note that inasmuch as Court practice would be the most frequent avenue to distinction, the highest class of practitioners, the most gifted in intellectual power, would devote themselves to it, and there would be a greater development of partnership arrangements by which different classes of practice would be conducted, as, in fact, they so frequently are now, by different partners, and which, in the event of the common law partner being unqualified for advocacy, would include within the firm a partner who was so qualified."

And at page 18 he says, "We may, therefore, I think, assume that, as regards conveyancing—which, however, is rather beside my subject—there would be the same class of exclusive practitioners as is now represented by the conveyancer at or under the Bar, and the pure conveyancing attorney; with no diminution in a sufficiently profound knowledge of real property law to carry on the conveyancing business of the country with success. With regard to Court practice, that would usually be undertaken by the same practitioner from the issue of the writ to the trial and concluding process. In most cases in which the advocacy in Court was severed, it would be undertaken by another member of the firm; in a comparatively few special cases an advocate would be retained. . . . Of course there will be clients as now; half of us probably have such, who will go to a young and active common law man for their writs and trials, and to a staid conveyancing man for their sales and purchases, and if they are so unfortunate as to require it, to a clever bankruptcy practitioner to arrange their affairs; but this will cut both ways, and work no disadvantage in the long run, and if there were anything in the point, it is unworthy of being raised in the discussion of such a question as this." He does not think, however, that the necessities of English practice would continue the division which now exists. He says, "The division of labour would be principally confined to the difference between Court practice and conveyancing, which, in the face of the existing division at the Bar between the same practitioners, could not be held to require or warrant the existence of separate orders; secondly, the functions of the advocate and the preparer of the case for trial, not being in their essence incongruous, but ordinarily and most naturally co-existent, the difference between them would, to a great extent cease, when the Bar was thrown open, and a career of distinction opened up to the successful practitioner; and, thirdly, the successful union of the two qualities and duties in the same person must be more beneficial to the suitor both as being more conducive to the successful conduct of the case to the end, as also from being necessarily less expensive in actual cost,

and more advantageous in point of economy of time; and, lastly, in the remaining cases, the severance of the two functions would present no practical difficulty."

One last extract referring to a most important part of the general question. Mr Saunders says: "Now I have, I hope, demonstrated that we have both reason and authority for holding that there is no natural barrier between the functions of the attorney in preparing a case for trial, and the functions of the advocate in conducting it on the trial; and I maintain most unreservedly, and in direct opposition to the objection we are now considering, that if the attorney have the requisite natural qualities for a successful advocate, he is by that very intimate knowledge of the case from the first, which he alone possesses—from that very personal acquaintance with the actors in the legal drama, the parties, their witnesses, and the whole surroundings and 'ins and outs,' so to speak, of the case—all the better fitted to conduct it through the stormy waters of the trial, and with a far better chance of successfully voyaging it into a secure haven. Granted that he may be betrayed into indiscretions by his hearty zeal for his client, who is to him a living verity, with rights to assert, or wrongs to redress, and whom he cannot look upon as a cold A. B. abstraction, I say that any such indiscretions—any such ebullitions of zeal—are drawbacks the most insignificant, compared with the unquestionable advantage to which I have referred; and that for one case which has been, or would be, thereby lost, there have been twenty shipwrecked for want, at a pinch or sudden turn of the case, of that thorough knowledge of its details with which the attorney is saturated, but with which the advocate is necessarily, more or less, imperfectly acquainted. For as it is a common observation how much the statement of any occurrence loses in accuracy by its transmission through various narrators, so also does a case lose in the clear and full apprehension of its facts by their filtration through the several minds of the attorney, and junior and senior counsel."

If we are to accept this as the correct view we must come to the conclusion that more than a single counsel in a case is a mistake, and that to have several counsel is an egregious blunder. We do not think that the opinion of solicitors generally tends to this conclusion. But if it is now thought advisable, for the proper management of all the details of fact and the mastery of law in a case, to employ two or three counsel, supported by an industrious attorney and one or more clerks, we cannot think that with any lapse of time the public or the profession will consider it advisable to drop into a custom of entrusting causes to a single attorney-advocate. We quite agree that there are a very large number of attorneys who are admirably fitted to act as advocates in our Courts. There are also numerous barristers better fitted for office or chamber work than for Court practice. We think it would be well if these could without difficulty step into their respective appropriate spheres. This would be virtually to abolish the hard and fast line which statute has drawn upon custom; but we think there will always exist in England a class known as counsel, who will have nothing to do with getting up cases. We think it necessary for the public that this should be so. We believe Mr Saunders agrees with us in this.

As regards Education, let us have as much of it as possible. The profession is sadly in want of it. The Law University, we think, is the best mode of conveying it to those who aspire to practise the profession of the law.—*Law Times*.

Obituary.—ANDREW COVENTRY DICK, Esq., Advocate (1827), died at Queen's Mount, Helensburgh, on the 14th Jan., at the age of sixty-six. He was the fourth son of the late Rev. Dr John Dick of Glasgow, Professor of Theology to the United Secession Church, by Jane, daughter of the Rev. George Coventry of Stitchell. He was born at Glasgow in 1804, was educated at Glasgow University, and graduated there. He died unmarried. He was buried in the Necropolis of Glasgow.

WILLIAM PAGAN, Esq., of Curriestanes, Kirkcudbrightshire, and Clayton, Fifeshire, W.S., who died at Clayton on the 20th Dec. last, was the eldest son of the late William Pagan, Esq., of Curriestanes, by Mary, daughter of — Cunningham, Esq., and was born in the year 1803. The deceased was a writer, a banker in Cupar-Fife, and provost of that town. He married in 1826, Janet, eldest daughter of the late George Hair, Esq., of Bankhouse, and by her, who died in 1866, has left, with other issue, an only son, George Hair, born in 1828. Mr Pagan's name is most widely known in connection with the important subject of Road Reform, for which he was the most distinguished advocate. He has also left a great reputation as an able and successful man of business.

Notes of Cases.

COURT OF SESSION.

(Reported by William Mackintosh, and G. F. Melville, Esquires, Advocates).

FIRST DIVISION.

FRASER v. FRASER AND HIBBERT.—Jan. 14.

Jurisdiction—Divorce—Lease.—Action of divorce on the ground of adultery, at the instance of W. T. Fraser, formerly of Skipness, Argyleshire, against his wife and Colonel Hibbert, an Englishman, as co-defender. Hibbert was tenant for five years, from May, 1869, of Ardlussa shootings, with shooting-lodge and garden, and of grass in Jura. Several of the acts of adultery were alleged to have taken place in 1868, in Hibbert's shooting-lodge at Loch Rosgune, Ross-shire. The question was whether Hibbert was subject to the jurisdiction of the Scotch Courts in respect of his holding the lease of Ardlussa. The L. O. (Ormidale) found that he was not. The Court recalled, found that Hibbert was subject to the jurisdiction of the Court, and found him liable in the expenses of the discussion. The rule was well established, that when a man possessed real estate in Scotland, he was subject to the jurisdiction of the Scotch Courts in all questions in reference to that estate. This principle had been extended so far as to make the proprietor of heritage liable in all personal actions. The nature of the title was of no importance. It was no matter that the title had not been completed. A mere title of apparency without possession had been held sufficient; also a mere right of superiority, though of no value. A beneficial interest under a trust had also been held to subject the holder to the jurisdiction of the Court. It had been contended that ownership was necessary, and that any right to land other than that of owner was not enough. It was not, however, in respect of ownership that a proprietor was subject to the jurisdiction, but rather in respect of his beneficial possession of an immovable right. A lease of land which gave a temporary right to the land was sufficient to bring the holder of the lease under the jurisdiction of the Court. If this were not so, there are many cases where persons who were in possession of valuable immovable rights would not be subject

to the Court—such as mineral leases and leases for building purposes. In many such cases the right of the lessee was much more valuable than the landlord's rights. No Court should attempt to exercise a jurisdiction which it could not enforce, but a lease could be attached by the diligence appropriate to heritage. They therefore held that a lease contained all the necessary properties which were required to sustain jurisdiction.

Ad.—Alex. Moncrieff, Gloag. Agents—Wilson, Burn, & Gloag, W.S.—Alt.—Paterson, Lancaster. Agents—J. & A. Peddie, W.S., H. & A. Inglis, W.S.

STEWART v. CALEDONIAN RAILWAY COMPANY.—Jan. 19.

Reparation—Negligence—Railway Company—New Trial.—This was an action of damages brought by William Stewart, nurseryman and seedsman, residing at Broughty-Ferry, against the Caledonian Railway Company, for an accident, whereby the pursuer sprained his ankle in stepping out of a railway carriage at the Broughty-Ferry Station, on the defender's line, on 13th January, 1869. The case has already been tried by two juries, who both found for the pursuer, in the first trial assessing the damages at 1s, and in the second at £200. The first verdict was set aside on the motion of pursuer, the Court holding that a verdict of 1s was irrational and inconsistent, as it had been proved that the pursuer had sustained substantial injury; and if he was entitled to any damages at all, those should be of a substantial amount. The defenders now sought to set aside the second verdict for £200, on the ground that they were not liable in damages at all, as they had done all that could be required to ensure the safety of passengers; and even if there was fault on their part, there was also fault on the part of pursuer, which contributed to the accident. It was an admitted fact that he had not used the footboard, and as he should have done so to be free from all blame himself, the jury should have found so, and given a verdict for the defenders. The pursuer maintained that the defenders had failed in their duty in three respects—1st, That the platform at Broughty-Ferry was too low; 2d, That there was not sufficient light at the place where the pursuer descended from the carriage; and, 3d, That the platform was in a state of disrepair, there being a hole at the place where the pursuer got out. One or more of these faults, or all of them together, had produced the accident. The pursuer had not himself to blame for the accident, as he had not acted with undue recklessness in not using the footboard provided for the use of passengers. It was proved that at a station passengers most generally stepped from the iron step to the platform, only a distance of twenty-two inches, and, that being so, it could not be said that his own negligence contributed to the accident.

The Court unanimously discharged the rule which had been granted on the pursuer to show cause why the verdict should not be set aside, and supported the verdict of the second jury for £200. They held that the lowness of the platform by itself did not infer negligence on the railway company, as it was the usual height, and suited to the ordinary class of railway carriages. With regard to the second fault alleged by the pursuer—the want of light—they held that, taken by itself, the want of light was not a sufficient defect to account for the accident, as it had been proved that the Broughty-Ferry Station was as well lighted as most other roadside stations. The state of disrepair in the surface of the platform they

held of itself to be sufficient cause of the accident. It had been proved that there was a hole $1\frac{1}{2}$ inch in depth below the average surface of the platform. If this had been an undulating depression, it was not easy to see how this could have been the cause of the accident. But this was not the case, as the hole had been proved to be irregular, and to have been close to the edge of the stone coping at the side of the platform. No one could step out on such a place without the greatest risk of sustaining such an injury. Nothing could have been made of the want of light if the platform had been in a proper state of repair. But it was the duty of the railway company, until they got the place repaired, to place a light at the spot, or to point out the defect in some other way. Assuming that there was only the ordinary light at this spot, the Court held that, taken together with the state of disrepair of the platform, it inferred negligence on the part of the railway company. They held that the pursuer, by stepping from the iron step of the carriage to the platform, and omitting to use the footboard, could not be said to have contributed to the accident. He only made a step of twenty-two inches, which was quite a reasonable thing to do, and one which was done by the great majority of people descending from railway carriages. It was doubtful whether it was not a safer thing to do this than to step first to the footboard—a height of sixteen inches, and then to step from the footboard to the platform, a height of only six inches. The question was not only whether what he did contributed to the accident, but whether it was negligent, and there was no evidence of negligence on the part of the pursuer. A new trial was therefore refused, with expenses.

Act.—Decanus, Thoma. *Agents*—Lindsay & Paterson, W.S.—*Alt.*—Advocatus, Johnstone. *Agents*—Hope & Mackay, W.S.

GIBSON v. SMITH.—Jan. 20.

Process—*Amendment*—*Sheriff*.—Gibson, grain merchant, Pettinain, sued Smith, Carnwath, for the amount of a bill drawn by Gibson upon and accepted by Smith. The S. S. (Dyce) gave judgment in favour of pursuer. The Sheriff (Bell) found that defr. had failed to establish the only defence proposed by him in the closed record, but that defr. desired to state a new defence—viz., that the bill produced at the proof was a renewal of the bill sued on, and having been retired, the liability of defr. was at an end—and allowed the record to be opened in order that defr. might state this new defence, on condition of defr. paying all previous expenses except the expense of the summons. After further procedure, pursuer appealed and maintained that under s. 16 of the Sheriff Court Act, it was incompetent to open up a closed record in order to introduce an entirely new defence.

The Court sustained the appeal, and held that this new defence did not come within the provisions of the Sheriff Court Act, which authorised the Sheriff *ex proprio motu* to open up records in order to allow of a fuller statement of the case, as in this case the motion had been made by the defender. The Sheriff had gone beyond his power. Under the Court of Session Act 1868, however, allowed the record to be opened up in order to allow the proposed amendment to be made now, under condition of payment by the defender of all the expenses in the Sheriff Court subsequent to those allowed by the Sheriff, reserving the question of expense in the Court of Session.

Act.—Hall. *Agents*—Maclachlan & Rodger, W.S.—*Alt.*—Asher. *Agents*—xonochie, Duncan, & Hare, W.S.

JAMIESON v. PATERSON.—Jan. 21.

Trust—Vesting—Discretionary Power to Convey to Beneficiary.—James Paterson, who died in 1850, conveyed to trustees his whole means and estate, expressing his wish to make provision for his son James L. W. Paterson, and that he should be brought up to his own business, “and in the event of his attaining an age, and being in the estimation of the trustees of a character and capacity, and himself possessed of the inclination for conducting the work,” the trustees were authorised to confer the management upon him. Further, the trustees were authorised to convey the whole, or such part as they might consider proper, of the trust-estate to him upon his attaining twenty-one years of age, or to any child or children of his body. They never made such conveyance, but paid sums out of the trust-estate for the maintenance of James L. W. Paterson, who died in 1868. He was married, and is survived by his widow and one son, and these are the claimants of the residue of the trust-estate. The factor *loco tutoris* to the son, claimed the residue in this M.P., as there had been no conveyance of the estate by the trustees to J. L. W. Paterson. Mrs Paterson claimed the residue on the ground that the estate had vested in her late husband, and had been conveyed to her by his settlement.

The L. O. (Jerviswoode) found it admitted that James L. W. Paterson had conducted himself to the satisfaction of his father's trustees; that on that footing, the trustees paid him various sums, which were expended on the purchase of a house, in furniture, and maintenance; that the residue must be held to have remained in the possession of the trustees truly for his behoof, and at his disposal; and therefore sustained the claims of Mrs Paterson, subject to a certain legacy, and the claims of her son under his father's settlement.

The Court recalled, and held that the part of the trust-estate which had not been conveyed by the trustees had never come into the possession of James L. W. Paterson, and could not be conveyed by his settlement. The trustees were entrusted with a large discretion in withholding the estate, and as they had not conveyed the whole estate, it must be presumed that they had come to the conclusion that it was prudent for them not to convey. The Court, therefore, sustained the claim of the factor *loco tutoris*.

BROWN v. GORDON.—Jan. 27.

Sheriff—Process—Additional Proof—A. S. 10th July, 1839, s. 83.—Appeal from Aberdeenshire in action of filiation. The proof was concluded on 31st May. More than one adjournment had been allowed on pursuer's motion in the course of the proof. The S. S. assoilzied. Thereafter a petition was presented by pursuer, stating that one of her own witnesses had confessed that the evidence given by her was untrue, that she had been tampered with, and so caused to make these false statements, and praying for a warrant to cite this witness for re-examination in terms of A. of S. 10th July, 1839, sec. 83. The Sheriff (Jamieson) held that pursuer had failed to show *weighty cause* in terms of the Act of Sederunt, and refused the petition.

The Court adhered to the judgments of the Sheriffs, holding that the case contemplated by the A. of S. was very exceptional, and that very serious reasons must be alleged in order to admit the discretion under the section.

If the petition were granted, it might lead parties to try, after a case had been decided, to get up evidence to contradict the evidence given at the trial, and so convert a trial of a civil case into a trial for the crime of perjury. Besides, it was difficult to see that pursuer had any interest to obtain the evidence she asked for. Even if the witness said everything she desired, it would not advance her case, as a witness who made such contradictory statements was utterly unreliable. The only way in which she could prevail would be to get the defender, who was alleged to have tampered with the witness, to contradict all he had formerly sworn to; and the Court could not assume that he would do that.

Act.—Scott. *Agent.*—W. Scott Stuart, S.S.C.—*Alt.*—Reid. *Agents.*—Renton & Gray, S.S.C.

SPECIAL CASE FOR JAMES BROWN AND ARCHIBALD MACDONALD.—*Jan. 28.*

Titles to Land Act 1868—Heritable Bond.—Mrs Margaret Oliphant died intestate on June 29, 1868, vested in a bond and disposition in security over heritable subjects; survived by an only son, Henry, her heir-at-law and executor. He made up no title to the bond, and died Jan. 18, 1869. Brown claimed as heir-at-law of Mrs Oliphant, and Macdonald as executor of Mrs Oliphant and Henry Oliphant, founding on the Titles to Land Consolidation (Scotland) Act 1868, s. 117, which makes heritable securities moveable, *quoad* the succession of the creditors in such securities. The Act came into operation on Dec. 31, 1868, after the death of Mrs Oliphant and before the death of Henry. *Held* that, as Henry had made up no title to the bond, he could not be held to be the creditor in it, and that, therefore, the question related to the succession of Mrs Oliphant; further, that, as Mrs Oliphant died before the commencement of the Act, her succession fell to be regulated by previous law of succession, and could not be affected by an Act that did not come into operation till after her death, and, therefore, that Brown, as heir-at-law to Mrs Oliphant, was entitled to make up a title to the bond.

Act.—Gibson. *Agent.*—William Mitchell, S.S.C.—*Alt.*—Black. *Agents.*—Curror & Cowper, S.S.C.

CHRISTIE'S TRUSTEES v. MUIRHEAD.—*Feb. 1.*

Holograph Acknowledgment—Stamp—Bill.—Action for payment of £50 alleged to have been advanced in loan in 1863 to defr. by Mrs Christie before her marriage, with interest at 5 per cent. Pursuers, Mrs Christie's marriage trs., founded on the following document:—"79 Queen Street, March 14, 1863. I acknowledge having received the sum of fifty pounds sterling from my sister Agnes Muirhead. Should it ever be in my power to repay her this sum, I will do so if required. Received the sum of £50 sterling.

"JAMES MUIRHEAD."

Pursuers alleged that the words "Received the sum of £50 sterling—James Muirhead," were holograph of defr., and were written over a receipt stamp. Defr. denied this, and that he had received the £50 from his sister—alleging that he had received certain sums, but that these were from his father. After proof, the L. O. found that the words were holograph of defr., that they were appended to the words which precede them on the paper, that the document was delivered by defr. to his sister, and that defr. was liable to pay the £50, with interest.

The Court adhered, holding that a holograph letter might be much affected by the circumstances under which it was written. It might (*e.g.*) be explained by another to which it was an answer. A cautionary obligation might be influenced by the fact of it being written on a document, and by its stating that it was granted for the debt contained within, whereas such an obligation alone would not import anything. So the defr.'s holograph obligation had reference to the obligation contained in the paper on which it was written. The only difficulty was to say under what category the document would come, and whether it required a bond or a bill stamp. The Court, however, were of opinion that it amounted only to an acknowledgment of the receipt of money, which in law was of itself evidence of a loan.

APPEAL—BELL *v.* SHAND.—*Feb. 2.*

Reparation—Assault—Day Trespass Act.—Appellant, who is the son of the tenant of the farm of Clayfolds, on the estate of Muchalla, raised an action of damages before the Sheriff of Kincardineshire, against the lessee of the shootings on that estate, for an assault committed on Oct. 23, 1867. Respt. had seized hold of appt., a boy fifteen years of age, having found him upon his father's farm in company with another boy who had been firing at rabbits, and had by force taken him away a considerable distance before he let him go. It was contended in defence that there were no circumstances amounting to assault; and that, if there were, it was justifiable at common law or under the Day Trespass Act. On the other hand, it was maintained that respt. could not claim privilege under that Act, because he had not complied with the statutory directions by requesting appt. to quit the land as well as to give his name, and because he had even, according to his own admission, never intended to make that apprehension which alone is authorised by statute. The S.S. and Sheriff found that no assault had been committed, and assolizied.

The Court refused the appeal, holding that the proof did not establish the assault alleged and the consequent injuries, and that appt. had been lawfully apprehended. Appt. was *prima facie* in the position of a trespasser, and was *prima facie* art and part in the offence of poaching; and even granting that he, the son of the tenant of the farm, could not be a trespasser, yet, by refusing to give his name, he prevented that fact from being known. Respt. was therefore justified in making the apprehension. And the lawfulness of the apprehension was not affected whether respt. retained the intention or never seriously entertained the intention to take appt. into custody. The evidence had further failed to show that the apprehension had been accompanied by undue violence.

Act.—Burnet, A. J. Young. *Agents*—Milroy & Hampton, S.S.C.—*Alt.*—Sol.-Gen. Clark, MacLennan. *Agents*—Morton, Whitehead, & Greig, W.S.

HILLSTROM *v.* GIBSON & CLARK.—*Feb. 2.*

Shipping—Charter-Party—Demurrage.—Hillstrom, master of the "Frey," sued Gibson & Clark, grain merchants, Glasgow, for £129 12s 6d, being demurrage and expenses for the detention of the ship at Greenock and bringing her up to Glasgow. The vessel was chartered to carry the cargo to a "safe port in the United Kingdom, or as near thereto as she may safely get and lay afloat at times of the tide, and deliver the same, and so end the

voyage." The vessel was ordered by defr.'s agent to proceed to Glasgow. The master, when he got to the Tail of the Bank, refused to take the vessel up to Glasgow, as there was not sufficient water in the harbour of Glasgow to allow the vessel to float at all states of the tide. Defra. had the cargo lightened by the removal of 1000 bolls of grain, but pursuer still refused to bring up the vessel, alleging that the voyage had come to an end. The parties, however, came to an agreement by which the lightened vessel was brought up to Glasgow, reserving the question who was to pay for this part of the voyage.

The S. S. (Dickson) found that the delay beyond the lay-days stipulated in the charter-party was occasioned by defr.'s fault in requiring pursuer to lighten the vessel at the Tail of the Bank, and that they were liable for demurrage and also for the other sums concluded for. The S. S. held it proved that there was a custom of the port for vessels first to lighten and then proceed up to the harbour, but that pursuer, a foreigner, was not bound by this custom, and, further, because the usual clause importing into the charter-party the custom of the port was deleted before signature. Upon a review of the authorities, the S. S. came to be of opinion that there was no precedent, and that, on principle, the charter-party was complied with by the master going for discharge to a place where the vessel could lie afloat, and where the discharge was practicable—such place being as near the port as she could reach in accordance with the proviso as to her lying afloat. The Sheriff (Bell) adhered, except as to the custom of the port, and found that there was no invariable custom proved.

The Court (L. Deas diss.) recalled these judgments, holding that the custom of the port was not imported into the contract, and could not influence the decision of the case, except in so far as the existence of a custom of vessels lightening at the Tail of the Bank showed that it was a reasonable and proper thing for defrs. to ask. All that defrs. required was that one-fifth part of the cargo should be taken out of the vessel so as to enable her to go up the river and discharge the rest at Glasgow. The Tail of the Bank was not a quay, but an open roadstead where vessels of the larger size were obliged to remain till they got out part of their cargo, and where it was dangerous to remain. Remaining in such a place was a risk both to the ship and cargo. It was therefore reasonable that defra. should require the master to allow a fifth of the cargo to be taken out, and to proceed to Glasgow Harbour with the lightened vessel. Under a charter-party, the master was bound to do all he could to perform his contract in good faith. Both the claims of pursuer for demurrage and for the expenses of voyage were ill founded.

Lord Deas was for affirming the judgments, on the ground that the words importing the custom of the port into the contract had been deleted. It must be presumed that this was done purposely, and it was quite reasonable, for the master was a foreigner, who might, under the charter-party, be sent to any port about the customs of which he knew nothing. The result of the judgment of the Court would be the same as if the master had been bound by the custom. Defr.'s requirement might have been reasonable if the master and owner had not had an interest to refuse. But the voyage would be prolonged and the lay-days lengthened if the vessel was lightened and brought into the harbour.

STEWART v. CALEDONIAN RAILWAY COMPANY.—Feb. 4.

Expenses—Jury Trial.—The Lord President, L. Ardmillan, and L. Mure, held pursuer not entitled to the expenses of the first trial from the defenders. The verdict for the pursuer, assessing the damage at 1s, was really for defrs. The general rule was that the party who failed to get a verdict should not recover expenses, because the presumption was that he had failed to bring the case properly before the jury. The miscarriage was on the part of the jury, and both parties must share the expenses of that trial.

L. Deas and L. Kinloch were for giving the expenses of the first trial, because if pursuer was entitled to prevail in the second trial, he was entitled to prevail in the first, the evidence of pursuer being the same on both. The party who was successful in the whole litigation should have his expenses, unless he had contributed to the miscarriage by same want of skill or by not bringing forward evidence. It would be very hard that pursuer, who had got the verdicts of two juries affirming fault on the part of the railway company, should come out of Court a poorer man, as he would probably do when he had to pay his own expenses in the first trial.

The Court therefore, by a majority, gave pursuer the whole expenses, except those of the first jury trial.

Act.—Decanus, Thoms. Agents—Lindsay & Paterson, W.S.—Alt.—Advocatus, Johnstone. Agents—Hope & Mackay, W.S. ¶

APP.—SHERAR v. WALKER AND OTHERS.—Feb. 4.

Mutual Wall—Agreement as to taking Band.—Respts., who, as trustees are proprietors of the U. P. Church, George Street, Aberdeen, presented a petition to the Sheriff, stating that when appt.'s house, which lies to the north of the church, was built about forty years ago, he or his authors obtained leave in building his house, "to take band" in the north wall of the church to the extent of $4\frac{1}{2}$ inches, but to the extent of one flat only. That appt., in heightening his house, had built his wall on the top of their wall to the extent of 9 inches of breadth without obtaining their permission. The petition prayed for interdict against appt. building to a greater extent than $4\frac{1}{2}$ inches, reckoning from the north edge of the wall, and further for an order to take down part of the wall which had been built.

The S. S. (Thomson), after proof, found that there was no evidence of any express bargain as to the breadth of the wall in which to take band or on the top of which he was to build; that appt. had failed to prove his averment that when a neighbouring proprietor pays for the privilege of taking band in his neighbour's wall, the invariable rule is that he pays for $4\frac{1}{2}$ inches of the wall, with a right to heighten the same by building on 9 inches on the breadth of the wall, and that the rule did not apply to the present case, where the wall was built entirely on ground belonging to the feuar who erected the wall. The S. S. explained that the proof established the practice in Aberdeen, that where a party pays for $4\frac{1}{2}$ inches of a *mutual* wall he has the privilege of banding to the extent of other $4\frac{1}{2}$ inches, and that both the parties may build wall over 9 inches of the breadth of the wall. But the S. S. was of opinion that the fact of the wall being not a mutual wall, but entirely built on trustees' ground, took it out of the ordinary rule. The Sheriff (Jamieson) affirmed.

The Court recalled these judgments, and held that on a construction of

the titles of the parties, and of the agreement as to taking band, appt. was entitled to take band to the extent of $4\frac{1}{2}$ inches, his predecessor having in 1826 paid for $4\frac{1}{2}$ inches of resp't's gables, and that it was implied in this transaction, as explained by usage, that he should be entitled to take 9 inches, and build on the top of the wall to that extent.

CRUIKSHANK v. SMART.—Feb. 5.

Charge—Extract Court of Session Act 1868—Final Judgment.—Susp., a writer in Fraserburgh, of a charge for payment of £21 17s 3d, being taxed expenses of an action in the Sheriff Court. In that action the S. S., on 18th May, assolizied defr., finding him entitled to expenses, subject to modification, and on 14th June the Sheriff adhered. The S. S. thereafter pronounced an interlocutor, modifying the expenses, and on appeal the Sheriff, on 12th Nov., decerned for £21 9s 3d, and 8s as expenses of the action and of extract. On 17th Nov., resp't. obtained an extract of these decrees, and gave the charge now sought to be suspended. Compl'r. pleaded that under s. 68 of the Court of Session Act 1868, it was incompetent to extract the decree before the expiry of twenty days from the last and final interlocutor in the cause, and that the extract in the present case was illegal, having been extracted only five days after the interlocutor awarding expenses. The L. O. on the Bills (Ormidale) passed the note.

The Court (L. Kinloch diss.) found that the extract was competently taken, recalled, and remitted to refuse the note of suspension. They held that, under the Act of 1868, the meaning of the "final judgment" was not changed, but remained the same as it had done before. The framer of that Act must be supposed to have known the meaning which the words were interpreted to have had under the different Acts of Parliament and of sederunt for the last fifty years, and to have acquiesced in that interpretation. L. Kinloch interpreted the words "final judgment" in the Act of 1868 to mean the last judgment, whether on the merits or on the question of expenses. It might be better, in many cases, for a party to wait till both these questions were disposed of, and bring up the whole cause at once.

WYLIE & LOCHEAD v. MITCHELL.—Feb. 17.

Property—Bankruptcy—Sale.—Appeal from the Sheriff Court of Glasgow; the trustee on the sequestrated estate of Hutton, coach-builder. Hutton undertook to construct a hearse for appts., for £95, to be delivered on 1st April, 1868, appts. supplying the carvings, turnings, and mouldings required of the value of £112 11s, the rest of the materials, including the body, wheels, and framework, being supplied by Hutton. The hearse was not finished by 1st April, and when it was nearly completed Hutton was sequestrated. A dispute having arisen between Wylie & Lochhead and the trustee as to the property of the hearse, £95 was consigned in their joint names, and the hearse was delivered to appts.

The Sheriff (Glassford Bell), affirming the decision of the S. S. (Galbraith), found that, when a party engages a tradesman to make any particular chattel, the property in it does not pass till completed, and this although the specific chattel is ascertained and the tradesman is bound to finish it and no other, and to deliver it, when finished, only to the person by whom it was ordered; that the hearse had vested in resp't. as Hutton's trustee, and

that no part of the price had been paid; that although Hutton, if he had remained solvent, would have allowed appts. to impute £75 16s 6½d, being the amount of a *contra* account due by him to them to the payment of the hearse when completed, yet that there had been no appropriation of the debt towards the price of the hearse, and that a debt existing before bankruptcy could not be pleaded in compensation of one arising after bankruptcy, nor could a wrong debt be pleaded in compensation of a claim for delivery of goods; that the obligation to pay the £95 emerged only when the hearse was finished; and as that was not till after sequestration, appts. could only claim the hearse from respt. on condition of paying him that sum, reserving their right to rank for the debt due to them.

The Court affirmed on different grounds. They held that the circumstances did not come under any of the well-defined forms of *specificatio* or *confusio*, nor was it the ordinary case of a sale. It was an entirely new case, in which it would be unsafe to resort to any fancied resemblances. It was rather a case of common property, where the principle was that the subject created by the voluntary combination of materials belonging to different parties is held as common property in proportion to the value of the several contributions. The principle of compensation dealt with by the Sheriffs did not enter into the case, but the result would be the same, as the sequestrated estate would be entitled to the £95 as the amount the bankrupt had contributed towards the construction of the hearse.

Act.—Sol.-Gen. Clark, Shand. *Agents.*—J. & R. D. Ross, W.S.—*Alt. A.* Moncrieff, Balfour. *Agents.*—Millar, Allardice, & Robson, W.S.

M'INTYRE v. M'DUGALD AND CARMICHAEL.—Feb. 18.

Reparation—Dogs—26 & 27 Vict., c. 100.—Action in the Sheriff Court of Argyle for damage to pursuer's sheep by dogs belonging to defrs. The S.S. (Home) found that pursuer had failed to establish that the dogs of defrs. killed or injured pursuer's sheep, and assoilzied. The Sheriff (Gleg-horn) recalled, and found it proved that the damage done on the 4th July had been done by defrs. dogs, and assessed the damage at £10. Carmichael appealed. The Court held that the proof established the fact that the damage done to the pursuer's sheep was done by the dogs of defrs. The evidence rested upon one witness mainly, corroborated by circumstances. This witness was contradicted by defr., and the question was which was to be believed. The Court believed the pursuer's witness. They relied very much upon the fact that defrs. had both destroyed their dogs soon after the action was raised, and that appt. had not given a satisfactory reason for doing so. It was also material that there was no evidence of sheep having been killed after the dogs were destroyed, while before that time there were several occasions when sheep had been found killed. The only remaining question was raised under 26 & 27 Vict., c. 100, sec. 1, which provided that it should not be necessary for the pursuer to prove a previous propensity of the dog to injure sheep or cattle. Was it enough to prove that the dog did the injury without any proof of *culpa* on the part of the owner? The Court reserved their opinion whether, when a man leaves his dog at liberty, and the dog kills sheep, the owner of the dog should be liable. It was unnecessary to decide this in the present case, as it had been shown that the son of the defr. was warned of the suspicion which attached to his dog, and he had neglected to look after it.

SECOND DIVISION.

SHAW'S TRUSTEES v. SHAW.—Jan. 20.

Action by the trustees of the late Mrs Susan Shaw, widow of James Scott, confectioner in Glasgow, thereafter spouse of Thomas Shaw, confectioner in Glasgow, to enforce payment by Shaw of £600 borrowed by him from the deceased in 1854, and for which he had granted an acknowledgment to the deceased, and interest from 1863.

Defence, that the £600 came to be in the wife's hands in virtue of an agreement which truly constituted a *donatio inter virum et uxorem*, and had been revoked. The first husband, who died in 1839, had carried on a confectionary business in Glasgow, and after his death the business was carried on by his widow, and after her marriage with the defender in 1843 by the widow and defr. In 1847 there was an adjustment of accounts amongst the various parties interested, the deceased, her children by her first marriage, and defr. A deed of agreement and copartnership was executed among all the parties, whereby they mutually renounced certain rights and made certain stipulations, and *inter alia* agreed that out of the profits realised since 1839 £600 sterling should be set apart for the special benefit of Mrs Shaw, as executrix of her first husband, exclusive of *jus mariti*, and Shaw renounced that right, which sum of £600 should be the sole and absolute property of the said Mrs Shaw individually as executrix foresaid, without reference to any restraint of her said husband, or otherwise. The question was whether the renunciation of *jus mariti* was revocable as a donation *inter virum et uxorem*.

The L. O. (Barcable) found that defr.'s *jus mariti* was excluded and renounced as part of a mutual and onerous transaction, of which defr. had taken the benefit, and that he was not entitled to revoke; and further, that the said exclusion and renunciation of the *jus mariti* applied to and comprehended not only the capital but also the interest or income accruing on the said sum during the subsistence of the marriage; and decerned in terms of the summons.

Defr. reclaimed, but the Court adhered, except that they held the exclusion of the *jus mariti* did not apply to interest accruing during the marriage.

DINWOODIE v. GRAHAM.—Jan. 27.

Dinwoodie, Inspector of the parish of Dumfries, sued Graham, Inspector of Hoddam, for sums expended by the parish of Dumfries in the maintenance of James Y. Thornburn. It was admitted that Thornburn was a lunatic; that he was found in the parish of Dumfries without private means, and that he had no known property or income in Scotland; that he was received into the Asylum, Dumfries, on a warrant of the Sheriff, under 20 and 21 Victoria, cap. 71, on the application of pursuer; that he was a native of Hoddam. Defr. averred that Thornburn had a right to an annuity of £40 a-year, but pursuer did not admit it.

The S. S. (Hope) found that he fell to be dealt with as a pauper lunatic, and that the burden of ascertaining whether or not he was a pauper, and of recovering funds, if such existed, rested with the parish of Hoddam, as the parish of his settlement, and that pursuer was entitled to be reimbursed for his advances. The Sheriff (Napier) adhered.

The Court affirmed, holding that the person whose maintenance was at present in dispute was not a pauper except in respect of being a lunatic. He was able-bodied, and there was no reason to suppose that he could not maintain himself if sane. At the time he was committed to the asylum by the Inspector of Police and the Inspector of the Poor, there was no available fund out of which his maintenance in the asylum could be secured. The Inspector of Dumfries did no more than he was bound to do under the Act of Parliament, and if he had not taken care of him he would have failed in his duty. If there be any funds available for the maintenance of the lunatic, the parish of Hoddam would be able to obtain relief.

Act.—*Millar, Burnet.* *Agent*—*W. S. Stuart, S.S.C.*—*Alt.*—*Fraser, Lancaster.* *Agents*—*Mackenzie & Kermack, W.S.*

STORNOWAY PIER AND HARBOUR COMMISSIONERS v. GIBSON.—*Jan. 27.*

Statute—*Harbour-Dues*—28 and 29 *Vict.*, c. 76.—Action against Gibson, fish-curer, for harbour-dues. The question referred to the rate which the Commrs. were entitled to charge for salt brought into the harbour in barrels. This depended on the "Schedule of Rates on Animals and Goods" appended to 28 and 29 Victoria, c. 76. The only entry in that schedule applicable to salt was in these terms—"Salt per ton, 3d." Defr. maintained that this entry ought to regulate the amount due by him in respect of the salt. Pursuers maintained that this entry was only intended to refer to salt shipped or landed in bulk, and that, as defr's. salt was packed in barrels, it fell to be charged at the rate of 1d per barrel, the rate charged for "unenumerated articles." The S. S. (Macdonald) found that pursuers were entitled to charge by barrel bulk. The Sheriff held that defr's. contention was well founded. The Court affirmed the Sheriff's judgment, and held that salt in barrels could not be considered one of the unenumerated articles. The mode of bringing in the salt did not bring it under the character of unenumerated articles.

Act.—*Sol.-Gen., Clark, Asher.* *Agents*—*Stuart & Cheyna, W.S.*—*Alt.*—*Decanus, Munro.* *Agents*—*Morton, Whitehead, & Greig, W.S.*

APPEAL—FRIENDLY SOCIETY OF STORNOWAY v. MACFARLANE.—*Jan. 28.*

Appeal—Competency.—Appeal from Ross-shire in a cause which originated in the S. D. Court, but was remitted to the ordinary roll. The conclusion was for the sum of £5 4s, being balance of aliment due to pursuer as a member of defrs'. society, in consequence of temporary inability to work. Defence that pursuer had received all that under the rules he was entitled to; and further, that the rules provided for settlement of all differences by arbitration. The S. S. assolizied, proceeding upon a resolution of the society adopted on April 8, 1867, whereby the rates of aliment were fixed as contended for by defra. The Sheriff (Moncrieff) altered, holding that the resolution in question was incompetent; that the rate of aliment claimed was correct, and that the case did not fall within the provision of the rules as to arbitration, in respect that it was not a dispute between members of the society, but between a member and the society itself. The Court refused the appeal as incompetent, in respect that the sum claimed was under £25, and on pursuer's statement it did not involve a continuing liability, but a liability which might terminate at any time by the restoration of his health.

CALEDONIAN RAILWAY CO. v. MEEK (COLLECTOR OF POOR-RATES, BARONY PARISH OF GLASGOW).—Feb. 2.

The question in this suspension was whether the Ry. Co. enjoyed exemption from poor-rates in respect of certain subjects now belonging to them, which had formed part of the original undertaking of the Forth and Clyde Canal. The amount at stake was £353 per annum, and the question turned upon the construction of certain Acts of Parliament, and in particular on Act of 1841 consolidating the Acts relating to the Forth and Clyde navigation.

The Court decided in favour of the suspender's exemption.

Act.—Watson, Johnstone. Agents—Hope & Mackay, W.S.—Alt.—Fraser, Burnet. Agents—Milroy & Hampton, S.S.C.

PRESTON, ETC. v. MAG. OF EDINBURGH.—Feb. 4.

Superior and Vassal—Relief of Poor-Rates and Public Burdens.—Declarator by Preston of Valleyfield and others, proprietors of nine acres of ground in the parish of St Cuthbert's, Edinburgh, feued by defrs. in 1757, and now largely built upon, that defrs. are bound, under the original feu-charter, to relieve pursuers of all teinds, ministers' stipends, cess, and other public burdens which have affected, or do or may affect, the subjects contained in said feu-charter; and further, for payment of sums of stipend paid by pursuers since 1859, when stipend was first charged on the subjects, and of the sum of £288 0s 1d, being the amount of poor-rates, burgh cess or stent, county land-tax, and other public and parish burdens paid by the pursuers and their authors for the last forty years, with progressive interest.

The obligation in the feu charter was:—"Which feu-contract and lands hereby feued, with the infefment to follow hereupon, the said Magistrates and Council bind and oblige them and their successors in office to warrant, acquit, and defend to the said George Lindsay and spouse and their foresaids from all and sundry encumbrances and grounds of eviction whatever at all hands and against all deadly as law will, and to free and relieve the said George Lindsay and his spouse and their foresaids of all teinds, ministers' stipends, king's cess supply, and other public burdens, which do or may affect the same now and in all time coming, excepting from the said warrandice the astriction and thirlage of the said lands to the Canonmills." Upon the construction of this clause various questions arose, especially with reference to the claim for relief of poor-rates, the defenders pleading that they were not liable for poor-rates upon the subjects as now increased in value by buildings, and maintaining this plea upon three grounds:—1st, That it was always a question of circumstances what was contemplated by the parties at the time the obligation was granted, and that it was plain that in 1757 it was not contemplated that the ground then feued at what appeared to be its agricultural value should in time be covered with houses; 2d, that the obligation, fairly read, implied merely an obligation to relieve of the proportion of poor-rates effeiring to the feu-duty; 3d, that, in any view, the amount of the feu-duty was the limit of the obligation, and the superior could not be called on to pay more under the obligation than the total amount of his estate in the feu.

The L. O. (Jerviswoode) after finding, by a previous interlocutor, that poor-rates were to be regarded as a public burden in the sense of the obligation, found that pursuers were entitled to relief of the various burdens,

including poor-rate. Defra. reclaimed; but the Court adhered, save as to the burden known as burgh cess, which appeared to have been imposed on the subjects in question by a statute subsequent to the date of the feu-charter.

BLAIRIE v. FRASER.—Feb. 5.

Appeal—Remit back to Sheriff.—Appeal from the Sheriff Court of Roxburgh in a cause where, prior to the appeal, the merits had been disposed of, but no step had been taken as regarded expenses. The appeal having been dismissed, the case went back to the Sheriff, and the successful party proposed to move in it for the purpose of having the expenses in the Sheriff Court disposed of. The Sheriff refused to deal with the process, in respect there had been no remit to him when the appeal was dismissed. Respt. thereupon presented a note to the Court, requesting them to make the remit required. The Court refused to make any order, holding that the case was no longer before them, but went back to the Sheriff as a matter of course, and without any remit—the effect of the dismissal of the appeal being to leave the case as if no appeal had been presented. The Lord Justice-Clerk observed that the remit would be “unnecessary, superfluous, and improper, and that he had no doubt, on this opinion being intimated to the Sheriff, there would be no further difficulty.”

M'NEILL v. MACKENZIE.—Feb. 5.

Feu—Condition—Servitude.—Suspension and interdict by Mr Archibald M'Neill, W.S., proprietor of No. 8 Hill Street, against Mr J. O. Mackenzie, proprietor of No. 7 Hill Street, for the purpose of preventing the latter from erecting certain dormer or attic windows in the roof of his tenement, whereby compr. alleged that the light in his chambers opposite was injuriously affected. The complaint was founded on a clause in respt.'s title, which was common to all the titles in Hill Street, whereby it was provided, *inter alia*, that the roof and chimney-heads of the said dwelling-house shall remain in the same form, height, and construction as they are at present, without any alteration whatever; at least that no alteration shall be made thereupon which shall disfigure the appearance of the street, either to the front or back parts, or be in any respect an annoyance or offensive to the proprietors or occupants of any of the houses in said street. The defence (apart from certain questions of competency) was (1) that compr. had no title to enforce the condition in respt.'s titles; (2) that the condition in question was not of such a character as to be capable of enforcement by a Court of law; and (3) that in any view, no injury had been done.

After proof, the L. O. (Mure) found for respt., on the third ground above stated. The Court adhered. *Held*, that there was no doubt of compr.'s title to enforce a condition inserted in respt.'s titles, obviously for the benefit of the body of the feuars in the street. Neither did they think there was any doubt that the condition was capable of enforcement; but, reading the clause in the title fairly, it appeared to be necessary to its application that there should be *injury* to the neighbouring tenements; and it was not proved that any serious injury had been caused by the operations complained of to compr.'s house.

Act.—Decanus, Monro. *Agent*—W. Sime, S.S.C. — *Alt.*—Advocatus, Mackenzie, Lee. *Agents*—Mackenzie & Kermack, W.S.

DUKE OF RICHMOND v. EARL OF SEAFIELD.—Feb. 16.

Salmon Fishing—Prescription.—Declarator by the Duke of Richmond (1) that (subject to a certain reservation) he had the sole and exclusive right of salmon fishing in that portion of the river Spey opposite the lands of Orton, etc.; (2) that, as an incident of that right, he was entitled to fish for salmon not only from his own side of the river, but from the other belonging to defr.; and (3) that defr. had no right to fish for salmon in that portion of the Spey. Defence (1) that pursuer, under his titles, had only right to the salmon fishings in question from his own side and up to the *medium flum*; (2) that he had no such possession as to extend his right; (3) that, on the contrary, there had been such possession by defr. as to preclude any acquisition of right by pursuer beyond the *medium flum*.

Pursuer's title consisted of an express Crown grant of salmon fishing "*super aquam de Spey usitate et consue.*" The possession proved consisted of a pretty constant exercise of the right on both sides of the river. Defr.'s title consisted of a grant of barony *cum piscationibus*, and of a *base* right of salmon fishing flowing from his authors. The possession proved by defr. consisted chiefly of rod fishing and a kind of fishing now long discontinued, known as "cairn" fishing.

The L. O. (Ormidale) found substantially for defr., holding that pursuer had only the ordinary right of a proprietor who holds a title to the salmon fishings *ex adverso* of his lands.

The Court altered and found substantially for pursuer.

The L. J. C. held that pursuer's original title had been explained or extended by prescription so as to include the right of salmon fishing over the whole river within the bounds in dispute. Lord Cowan and Lord Benholme held that, apart from prescription, pursuer's title was *per se* sufficient to lead to that result. All their Lordships agreed that defr. had not, in virtue either of his titles or of prescription, a right of salmon fishing within the disputed area.

DICKSON v. TRUSTEES OF ST PATRICK'S CHURCH.—Feb. 17.

Arbiter—Witness.—Dickson, a joiner, sued the trustees of St Patrick's Roman Catholic Church, Edinburgh, for the price of repairs and alterations on the church. The balance claimed was £167, the sum offered was £81; but the trustees maintained that any question as to the amount fell to be settled by their architect, who had been appointed arbiter under the contract. This action concluded (1) for reduction of the clause of reference upon various grounds; and (2) for payment. The L. O. (Jerviswoode) allowed a proof over the whole cause, and the architect was examined as to the merits of pursuer's claim. Pursuer contended that this was *per se* sufficient to disqualify him. The L. O. held that there was no reason to interfere with the reference, and dismissed the action. The Court reversed, and found that, by examining the arbiter as a witness upon the matters proposed to be submitted to him, defra. had precluded themselves from any longer insisting in the reference, and that pursuer was entitled to have the merits of the case disposed of in this action. The Court sustained his claim to the extent of £78.

Act.—T. C. Smith. *Agents*—Douglas & Smith, W.S.—*Alt.*—Mackenzie, Kerr. *Agents*—Macdonald & Roger, S.S.C.

PRATT v. MACKIE.—Feb. 18.

Sheriff—Additional Proof—A. of S., July, 1839.—Appeal from the Sheriff Court of Aberdeen, in an action of filiation and aliment. The summons alleged that the child was the result of intercourse, “in or about the month of April, 1868.” The defence was a simple denial. The proof having been closed and debated, but no judgment pronounced, defr. presented a petition for additional proof, setting forth that, owing to the vagueness of pursuer’s summons, he had not been prepared to meet the evidence which she had led, and that he could now meet it with an *alibi*, the details of which were specified in the petition. The S.S. granted this petition. The Sheriff recalled and refused it, holding that no “weighty” reason had been shown in terms of A. of S., 1839. The S.S. then upon the proof led decided in favour of pursuer. On appeal, held that, even taking the case as it stood, pursuer had failed to make out her case. Opinion that, looking to the vagueness of the summons, defr. might very well have been taken by surprise at the proof, and was, therefore, fairly entitled to ask for an opportunity of supplementing his evidence. The A. of S., 1839, no doubt required “weighty” reasons for an allowance of additional proof, but that only applied when there had been a judgment, as well as a closing of the proof.

Act.—Reid.—Alt.—Buntine.

OUTER HOUSE.

(Before Lord Ormisdale.)

AUSTIN v. AUSTIN.

Expenses—Revising Summons by Counsel.—Pursuer obtained decree in absence, with expenses. In taxing, the auditor disallowed the fee to counsel for revising. Pursuer objected, on the ground that, as under the recent Court of Session Act records are almost invariably closed on summons and defences, it is necessary that the pursuer’s case should be fully and properly stated in the summons, and that this should be done under the guidance of counsel. The L. O., without laying down any general rule, was of opinion that in this case the revisal of the summons by counsel was a proper step to take, and sustained the objection.

HIGH COURT OF JUSTICIARY.

KIRKPATRICK v. MACKAY.—Feb. 4.

General Police Act—Jurisdiction—Review.—Suspension of a conviction by Magistrates of Dumbarton obtained against complr. for breach of the General Police Act in not lighting certain private courts over which complainer was factor. Without deciding anything as to the merits, *Held* that the jurisdiction of the High Court was excluded by s. 430 of the Act, which confined the review of such sentences to the Circuit Court.

Act.—Thoms. Agents—Lindsay & Paterson, W.S.—Alt.—Lancaster. Agents—Murray, Beith, & Murray, W.S.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ARGYLSHIRE.—Sheriffs CLEGHORN and HOME.

FERGUSON v. THE KIRK-SESSION OF INVERARAY.

School—Trust—Mortification.—Action at the instance of Peter Ferguson, formerly teacher in Inveraray, and rector and sole master of the Grammar School of the burgh of Inveraray, now teacher in Dunblane, against the Rev. Neil MacPherson, one of the ministers of the collegiate charge of the parishes of Inveraray and Glenaray, moderator of the kirk-session of said parishes; the Rev. Donald Carmichael, residing in Inveraray, the other minister of the said collegiate charge, and the other individual members of the collegiate kirk-session for themselves, and as composing the session of said united parishes. The pursuer, who was for some time teacher of the Free Church School in Inveraray was, on 3d Dec., 1867, appointed by the magistrates and town council of Inveraray rector and sole master of the Grammar School of said burgh, with right to demand, uplift, and receive all the fees, profits, and emoluments belonging to said office, including the annual proceeds of a mortification of £1000 Scots in the hands of the said collegiate kirk-session, held by them in trust for behoof of the said Grammar School, together with the interest which had accumulated in their hands; and the annual proceeds of the sum of £100 sterling, mortified by the deceased James Campbell of Stonefield, held by the said kirk-session in trust for behoof foresaid, together with accumulated interest thereon. The pursuer entered on office and discharged the duties of rector and master of said Grammar School, and in respect thereof claims the sum of £13 11s 3d (with interest, etc., which is not admitted by the defenders), being amount of interest at the rate of five pounds per centum per annum, from 11th March to 11th September, 1868, on the sum of £542 12s 8d, being the amount of said mortifications or moneys held by the defenders for behoof aforesaid: The defenders, on the other hand, contend that the magistrates and town council of Inveraray had no right or title to nominate or appoint the pursuer to the office of rector or sole master of the said Grammar School, and that the alleged appointment is void, in respect the defenders have an equal right to and interest in the appointment, and who are co-patrons, and were no parties to the alleged appointment, and in point of fact the Grammar School of Inveraray has for long ceased to exist. They also dispute the correctness of the account libelled in the summons, and aver that they never held in trust for behoof of the Grammar School a mortification of £1000 Scots—nor was any such sum mortified by any person to them. They deny that the said deceased James Campbell of Stonefield mortified the sum of £100 sterling for behoof of the master of said Grammar School, but explain that he bequeathed that sum for behoof of the said school, appointing the defenders trustees of the same, the interest of which was allocated and paid to the master of the English School. They further contend that the earliest trace that can be found of the Grammar School of Inveraray is in the year 151. The school was founded and governed by the kirk-session alone,

and they were at that time, and have continued ever since, the patrons of it. At all events since its foundation, and down to on or about the year 1851, when the last appointment was made, every appointment of master was made by the said kirk-session and town council concurrently or jointly with the former; not only so, but the kirk-session not unfrequently exercised their right of patronage in and over the said Grammar School, by dismissing the masters on the ground either of incompetency or immorality; and as the defenders were not consulted in the appointment of the pursuer, and knew nothing whatever about him or his qualifications or the conditions under which he carried on his school, he had no right to the proceeds of the said moneys. The town council never possessed school buildings; on the contrary, the defenders allege the building in which the Grammar School was conducted was built by the Duke of Argyle, and the kirk-session not unfrequently contributed to the expense of its maintenance and repair; and in the circumstances, as fully stated in the defenders' pleadings, the pursuer had no right or title to institute the action. After a record was made up, and voluminous documents produced, the following interlocutor was pronounced by the S. S.:—

Inveraray, 4th June. 1869.—The Sheriff-Substitute having heard parties' procurators, and made avizandum with the closed record and whole process, Finds that the master of the Grammar School of Inveraray has been in use to be appointed by the magistrates and town council, with the consent or approbation of the kirk-session; Finds that the said consent or approbation is necessary to a valid appointment; Finds that the pursuer, Peter Ferguson, was not appointed with the said consent or approbation: Therefore finds that the said Peter Ferguson has not been validly appointed master of the Grammar School: Therefore assoilizes the defenders from the conclusions of the action: Finds the pursuer liable in expenses: Appoints an account thereof to be given in, and remits the same when lodged to the auditor to tax and report; and decerns.

Note.—This case turns upon the right to appoint the master of the Grammar School of Inveraray. The pursuer was appointed by the town council alone, without consulting the defenders, who allege that they have a joint right of patronage, and therefore refuse to recognise the pursuer as master of the school. The history of the establishment of the school is not clear. The town was erected into a royal burgh in 1648, but the existing burgh records only date from 1662. The kirk-session records date from the division into two distinct congregations—one Gaelic and one English—of the parish of Inveraray. This seems to have taken place on 12th November, 1650; the session was appointed on the 25th of the same month; and in the minutes of 1st December, the first meeting at which any business was transacted, there is mention of "a poore scooler in the Gramar Schooll," which shows pretty clearly that the Grammar School existed before the kirk-session, and they consequently can have no claim to have founded it. The management of the school has practically been in the hands of the town council, at least since the appointment of Tobais Martin in 1708 to be master. It is in their books the minutes of appointment were made; the fees and school hours were regulated by them; it was to them the masters resigned, and they were removable at their pleasure. Even when, as sometimes appears, they were nominally removable by both council and kirk-session, intimation of dismissal was to be made by a magistrate, with consent of the

majority of the council, thereby leaving it practically in the council's hands. No doubt, there are one or two cases in the last century of the session interfering directly in the management, but these are so rare that nothing can be founded on from them, and probably proceeded from the influence of the session on the schoolmaster or doctor, as their session-clerk. There is one instance in this century of an apparent interference, when Riddoch, on 24th June, 1830, applied to the kirk-session to fix the vacation; but he was acting as session-clerk, and probably as parish schoolmaster then, the session-clerk and schoolmaster being absent, and if so, his application would be for the parish school, not the Grammar School.

The first notice of the appointment of a master is that of MacLaurin in 1677, and the second is Duncan MacLea in 1703. They were both appointed by the kirk-session, apparently without consultation with the town council, but the town council records of these dates are not extant, and there is therefore only the notice in the session records.

As regards the doctors, John Verner was appointed doctor and session-clerk by the session alone in 1660, and except the disputed case of appointment of John Campbell in 1658, this is the only case of the session alone appointing a doctor.

This, however, is to be remarked in each of these four cases, that the appointment of session-clerk was given to the schoolmaster or doctor, either along with or immediately after his appointment to the school, and it was from that source that a great part of the salary was drawn. There are many other masters and doctors named in various minutes before 1703, but except that of John Fisher, who was appointed by the town council alone in 1662, we find no trace of their appointments; they are not entered in the kirk-session records, which are more perfect (although with considerable blanks too) than those of the town council, and of those already mentioned as appointed by the kirk-session, two at least resigned to the town council alone.

From before MacLea's time the schoolmaster was session-clerk till the appointment of Campbell in 1741, when it would appear Fallowsdale, who was then English master, became session-clerk. He resigned the session-clerkship in 1756, having been appointed schoolmaster in 1749, and from that time on it was held by the English master.

Maclea's successor, Tobias Martin, was appointed by the town council alone, and he was the same day appointed session-clerk by the kirk-session. Thereafter all the appointments both of schoolmaster and doctor are made by the town council, with at least the concurrence or approbation of the kirk-session, except those of Wilson, in 1717, who seems, like Martin, to have been appointed schoolmaster by the town council, and session-clerk by the kirk-session; and of Walter Nicol, appointed doctor by the town council alone in 1756.

So long as the offices of session-clerk and schoolmaster were held by the same person, it seems to the Sheriff-Substitute that there is much in favour of the view that the consent of the kirk-session, for it is really no more, is to be ascribed to this:—"It affords sufficient reason for their being consulted, and if there is any presumption of patronage of a burgh school, it is in favour of the town council. But after the schoolmaster ceased to be session-clerk, or to receive anything directly from the kirk-session, the terms of appointment are practically the same." And this points to the

conclusion that at the time at least the right of approbation or concurrence was not considered to arise either from the schoolmaster being session-clerk, or from his receiving anything from the kirk-session; and as this right was so exercised down to the appointment of Riddoch in 1829—that is, for a period considerably exceeding half a century—it seems to the Sheriff-Substitute that the kirk-session must be held to have acquired at least a prescriptive right to approve of the person appointed as master to the school.

No doubt it is argued by the pursuer that under the arrangement of funds contained in two minutes on 14th Nov., 1788, £5 a year, which was paid by the session to the English master, is erroneously stated to have been paid by the burgh, and that this contribution accounts for their concurrence in the patronage of the school. But even granting that the fact of the contribution is correct, the Sheriff-Substitute does not concur in the inference drawn from it. If the session gave £5 a year to the English master (who acted as their session-clerk, treasurer, and precentor), it would be a most natural thing that they should concur in his appointment, although they do not seem to have done so in Nicol's case; but it would not in any way account for their concurrence in the appointment of the schoolmaster, who did none of these things, towards whose salary they contributed nothing, and with whom, after his appointment, they do not seem to have anything whatever to do.

It is with some regret the Sheriff-Substitute has felt himself forced to come to the conclusion that a right of concurrence has been established by the kirk-session. Such rights are extremely inconvenient in their exercise, and not of a nature to benefit any party concerned, least of all the Grammar School, for the good of which the right is supposed to exist, and which is more likely to be extinguished than helped by such assistance.

Against this interlocutor the pursuer appealed and lodged a reclaiming petition, and the defenders having lodged answers, the following is the interlocutor of the Sheriff-Principal:—

Edinburgh, 17th September, 1869.—The Sheriff having considered the appeal for the pursuer and reclaiming petition, with answers for the defenders, and whole process, recalls the interlocutor appealed against: Finds that the consent or concurrence of the defenders is not necessary to the validity of the pursuer's appointment as master of the Grammar School of the burgh of Inveraray: Therefore repels the first and second pleas in law for the defenders; and appoints the case to be enrolled that parties may be heard on the remaining pleas with reference to the subjoined note.

Note.—The Sheriff has considered, with much care and anxiety, the history of the schools of Inveraray, as disclosed in the records of the town council and kirk-session, and as explained and ably commented on in the pleadings. Unfortunately there are many blanks in both records, and thus the origin and early constitution of the schools is left in considerable obscurity. The earliest minutes show that the Grammar School was in existence in 1650, when the Lowland kirk-session was constituted as distinct from the Highland, and two years after the date of the Burgh Charter; but the kirk-session existed before in its undivided state, and the burgh seems to have been a burgh of barony long before obtaining a charter from the Crown.

During the latter part of the seventeenth century, some appointments of masters or assistants seem to have been made by the kirk-session; but

certainly, from the beginning of the eighteenth to the middle of the nineteenth century, all the appointments of masters were made by the town council, usually with consent or concurrence of the kirk-session, and were invariably recorded with all arrangements as to salary, fees, hours of school, etc., in the records of the burgh alone. In 1736, an English school was commenced, which seems to have been treated sometimes as a branch or department of the Grammar School, but more generally alongside of, and in connection with it, and the appointments of its masters were made in the same way in the town council records. In the early part of this century, the English school began to be regarded as a proper parochial school, and the assessments raised under the Act 43 Geo. IV., cap. 54, were appropriated to it. But the patronage of it continued the same until 1830, when circumstances occurred, founding on which the heritor and ministers laid claim to be sole patrons, and succeeded in establishing their right under a submission to Lord Cowan in 1851.

The old sources of support for the Grammar School having been nearly all lost or carried over to the parish school, and the Duke of Argyle, the sole heritor, having refused to allow the burgh any further use of the building he had formerly given for the purposes of the Grammar School, that school has, since Lord Cowan's decision, been in abeyance. The magistrates and town council, however, have now appointed the pursuer master of the Grammar School, and have authorised him to sue for the interest of certain old mortifications alleged to be in the hands of the kirk-session, as trustees for behoof of the Grammar School, or its master. Hence this action, in defence to which the defenders plead, first of all, that the pursuer's appointment is invalid, in respect it does not bear to be with their consent or concurrence, either as joint patrons or as from long usage, having a right to be consulted in such an appointment.

The view that the kirk-session have a joint right of patronage seems to have no good foundation, and is, indeed, not seriously maintained. But it certainly was very long the usage for the town council to minute the consent or approbation of the kirk-session to the appointments of masters of the Grammar School. The mere doing of a thing, however, for a long series of years will not found an obligation or a right to continue to do it in all time coming, unless it is connected with some title or grant. The right of the magistrates and council of a burgh to set up a school, grant the right to teach within the burgh, and to appoint the masters, is clear, and it is admitted in the answers (p. 5). But it is not one of the functions of a kirk-session to do so. The magistrates and town council, the natural patrons of a burgh school, might naturally and most wisely consult the kirk-session, looking to the special qualifications of the ministers in the selection of teachers, and confirm their choice by minuting the approval and consent of the body consulted. But it is not thought that a usage to do this for any length of time would constitute an obligation on the burgh to continue to do so in all time coming, and under all future changing circumstances. If the patron of a parish were for more than forty years to consult the elders in the selection of ministers, and to issue his presentations with their approbation and consent, that would not confer on the eldership any prescriptive right of veto.

It would be different if the kirk-session could point to any written constitution of the school, or if they could prove that they had been its

founders in whole or in part—founders, that is to say, not in the sense of beginning and maintaining it from year to year, but in the sense of endowing it in perpetuity with money or buildings. But here there is no written charter, grant, or constitution, for the school, referred to or alleged, and unfortunately the school has neither buildings nor endowments of any kind, unless it be the mortifications now in question, one of which came from Campbell of Stonefield, and the other is denied by the defenders to exist at all. The case is precisely as if the patrons had always appointed, with the advice and consent of the professor of humanity in the University of Glasgow. In the absence of any written constitution or title, the mere fact of the municipality having always consulted a learned professor in their appointments, would not give that functionary the power to insist that no future appointments should be made without his consent. Possibly the parish minister, time out of mind, has been asked to preside at the burgh school examination, but that surely will not give a right to demand that no one else shall fill that chair on such an occasion.

The case is stronger for the pursuer in several particulars than it would be on these general principles alone. In the first place, the usage to minute the consent of the kirk-session was by no means invariable. Not to mention the case of Fisher in 1662, the town council alone appear to have made the appointments of Martin in 1708, Nicol in 1756, Riddoch in 1829, and Linn in 1844; while the appointments of Hislop in 1836, Kemp in 1837, and Murray in 1841 were made with the "approbation of the ministers" of Inveraray, not with the "consent" of the "kirk-session." Even a few instances where the consent was not sought or obtained are stronger against an obligation to obtain it than a long series of instances where it was obtained, can be to raise a presumption for such an obligation, and it is to be noticed that the consent never was given at any meeting of the kirk-session, nor was ever recorded in their books. On rare occasions there was a joint meeting of the town council and kirk-session—usually the ministers or some members of session attended and signed the council minutes, but sometimes no one was present for the kirk-session. It is further to be noticed that the defenders are not able to point to any instance where they successfully exercised a veto, or where, not being consulted, they interfered and quashed an appointment.

In the next place, in answer to the argument that long usage presumes some grant or constitution, it has been successfully shown by the pursuer from the minutes that the reason why the consent of the kirk-session was so frequently obtained was that for a very long period they contributed to the maintenance of the masters either by a money salary or by appointing one of the masters session-clerk, with the emoluments attached to that office. This circumstance affords a sufficient explanation of the consent of the kirk-session being taken, and seems to refute the defenders' argument; for no length of practice to take the consent of a party contributing to maintain the school will rear up an obligation to consult that party after ceasing to contribute. For some time, indeed, after ceasing to contribute, the kirk-session still gave authority for their interest in certain funds to the town treasurer to collect them, and so their consent continued to be minuted. But by 1829 all these funds, such as the Lismore teinds, had been withdrawn, and in that year Riddoch was appointed master of the Grammar School without any mention of the kirk-session, and held the

office unquestioned till 1836, when he resigned to the town council. Between 1836 and 1851 the appointments were not made in the old form, but two of them were "with approbation of the ministers," one by the town council alone, one on report of a committee which had consulted with one of the ministers, and the last "with consent and approbation of the ministers, for the kirk-session."

Usage may no doubt become of importance when referred to in a statute or charter, as when the Act 43 George III., cap. 54 provided that in a parish consisting partly of a royal burgh, the teachers shall be appointed "by the burgh or the landward heritors, or by the burgh and landward heritors in the same way and manner as had hitherto been observed in said parish."

It is needless to observe that there is no such statute stereotyping the practice as to the Grammar School, and the history of the English school shows how easily a usage may be changed, for Lord Cowan, while he observed that if the question had arisen soon after the Act the patronage would have been in the burgh, according to the then usage, held that a contrary usage, by Riddoch's appointment in 1830 by the heritor and ministers, was sufficient to deprive the burgh of all right by usage, and to transfer the patronage they had held since 1736 to the heritor and ministers. On the same view the Sheriff conceives the appointment of Riddoch in 1829 to the Grammar School by the burgh alone, especially taken along with subsequent appointments, was quite sufficient to break through any former usage, and leave the town council unfettered in its patronage.

It is quite evident that the kind of joint patronage contended for by the defenders would be in any hands a most inconvenient and anomalous mode of management. But it is further apparent that if a power of controlling the appointments to the Burgh School were recognised as a right of the kirk-session, of which the ministers form an important part, as they do of the patrons of the Parochial School, the defenders might be tempted to use their veto with reference to the supposed interests of the rival school, and in a way detrimental to those of the municipal institution. So far, therefore, as expediency can be regarded, it furnishes an argument against sustaining the two first pleas of the defenders.

With regard to their third plea, the Sheriff considers it unsound, so far as it asserts for the defenders, as trustees of funds mortified for the benefit of the burgh, a right on that ground to require their consent to be asked to the appointment of teachers. But so far as it maintains that if they are not consulted the particular endowment may be withheld by them, this will depend on the terms of the mortifications, which will be the subject of future proof and discussion; and the Sheriff may add, as trustees the defenders are entitled and bound to see that the sums they are called on to pay are truly applied to the purpose for which they were intended, and that the pursuer is the *bona fide* teacher of a proper Grammar School, which they appear on record to deny is the case. That will be matter for future investigation in the cause.

Act.—Macniven.—Alt.—Wilson & Douglas.

SHERIFF S. D. COURT OF ABERDEENSHIRE.—

Sheriff COMRIE THOMSON.

M'KAY v. KIDD.

Reparation—Liability for trapping domestic Cats.—In this Small Debt Court £1 1s of damages was sued for in the circumstances detailed in the observations made by the Sheriff in giving judgment:—In this case the pursuer claims damages because a cat belonging to him was killed, in consequence of being taken in a trap which had been set by the defender within his own garden. The defender's answer to the claim is that his flower beds were torn up and otherwise injured by cats, and that he is entitled to protect himself from their ravages. The question raised has an amusing side to it, but it really seems to involve considerations of some nicety as matters of law. So far as I have been able to discover, there is no authority to be found on the subject, and the case must, therefore, be decided on broad equitable principles. It seems plain that if it had been a dog, and not a cat, that had been caught in the trap, the trapper would have been liable in damages to the owner of the dog. Dogs are specially recognised by our law as property. Licenses are taken out for them, and to steal a dog from its owner is theft. But the legal privileges of the cat seem to be less clearly defined. It is true that cats are much prized by some people, and in a certain sense a right of ownership may exist in a cat, but there are considerations arising from the nature and habits of cats which seem to me to indicate that when they are not actually in their owner's possession or premises, they must take their chance of such casualties as that which befel the cat in question. In other words, I hold that the owner of a cat must look after his cat, and that if it strays and is injured he cannot recover from the person who is the cause of the injury, unless it can be shown that it was inflicted wilfully and wantonly. A man whose garden is destroyed by the nocturnal visits of cats, has surely some remedy. The fact that night is the creature's usual time for wandering, makes it next to impossible to set a watch. Such preventives as wire netting or expensive box traps are too elaborate to be thought of, even if they were likely to serve the purpose: the Police Acts prohibit shooting in a town, and the use of poison in exposed places is also illegal. Besides, it must be borne in mind that there are "cats and cats." Probably for one cat that has an owner, there are ten that have none. But an ownerless cat is undoubtedly *vermin*, and may be lawfully killed, so long as no wanton cruelty is inflicted. If a man is entitled to protect himself against cats that belong to nobody, as he certainly is, and if he sets traps for them, is he to be held responsible, if a cat that has an owner, "a local habitation," and probably a "name," forgetful of its domestic comforts and restraints, wanders at night into the company of the lapsed masses of its kind, and is injured? I decide this case in favour of the defendant, on the broad grounds that he was entitled to protect himself from the ravages of cats generally, that he did so by the use of an ordinary vermin trap, that it was no fault of his if a cat, that was not vermin, but the property of a neighbour, was unfortunately caught in it, and that the owner of the cat should have looked better after it. It is useless to say that the unfortunate florist might sue for damages, because the owner of a cat can with difficulty be traced. The uniformity of the colour of cats in the dark has passed into a proverb, and, as has been

noticed, the majority of cats are free lances, and own no master. I think it would have been more neighbourly if the defendant had intimated to those who owned cats near him, that he intended to set a trap, so that they might have kept their favourites at home, but I am not aware of any legal obligation binding on the defendant to do so. As there is no appeal from my judgment in this case, and as many good people really like cats, I think it right to mention that the view which I have adopted is concurred in by Sheriff Jameson and by another learned Sheriff of great experience, and whose well-known work has been cited to me, with both of whom I have consulted.—Absolutor.

STEWART COURT, KIRKCUDBRIGHT.—Sheriffs HECTOR and DUNBAR.

M'CORMICK v. DUNKELD.

Illegitimate Child—Right of Custody.—The facts are disclosed in the interlocutor. The S. S. pronounced this interlocutor:—

Kirkcudbright, 27th October, 1869.—Having considered, etc., as matter of fact, Finds it admitted that the defr. is the father of the female illegitimate child referred to in the libel, and that said child is still alive; that the mother of said child died on 10th December, 1868, leaving no property or effects; that said child has, since its mother's death, remained in the custody of the petr., and been supported by him; and that from the period of its birth until said 10th December, 1868, it was in the custody of its mother, who lived in family with the petr.; that from the period of the child's birth, on 4th April, 1867, until the present date, the defr., a grain dealer in Maxwelltown, has contributed towards the mother's in-lying expenses, and aliment of the said child, only the sum of £2 stg.: Finds it stated in defence *inter alia* against the petr.'s claims for these in-lying expenses, and for past and future aliment of the said child, that the defr. is willing, being now married, to take the child into his own custody, and provide for its future maintenance; Sustains said defence, as regards the father's claim for aliment of the child subsequent to the date of the present interlocutor, provided the defr. shall fulfil his offer to take immediate charge of the child; *Quoad ultra* repels the defence, and finds the defr. liable, under deduction of the said £2 stg. paid by him to account of in-lying expenses and aliment, in payment to the petr., on his own account as the disbursar, and as representing his deceased daughter, in payment, 1st, the sum of £1 11s 6d of in-lying expenses attending the birth of the child; 2d, of the sum of £5 stg. yearly as aliment of the said child from the period of its birth till the present date, and with interest at the rate of 5 per cent. per annum on the arrears of aliment, calculated as payable by equal quarterly instalments, commencing at the birth of the said child, and always in advance until paid; *Quoad ultra* sustains the defr. against the pecuniary claims in the summons; assolizies the defr. from the conclusions of the action: Finds the defr. liable in expenses, etc.

Note.—The sums of aliment now awarded appear to the Steward-Substitute moderate in amount, when he adverts to the defr.'s position in life, and his inexcusable indifference to the maintenance and sustenance of his child for the long period of two years and eight months, during which

it has been preserved from starvation principally by the charitable feelings of the petr.

On 17th November, 1869, the Sheriff affirmed, adding this

Note.—The interlocutor of the Steward-Substitute is appealed against only by the petitioner, who insists that the defender is not entitled to have the custody of and to maintain his illegitimate child in question, but is bound to allow the child to remain in the custody of the petitioner (the father of the mother) and to pay future as well as past aliment to the petitioner.

It is not disputed that the child was born on 4th April, 1867; and the petitioner has founded strongly on the case of *Weepers*, decided in the Supreme Court, 20th June, 1844. If the mother of the child in question were alive and in charge of her infant child and pursuing for aliment, that case, as well as others, might be held available against the defence founded on the father's offer to take charge of his child.

But the mother of this female child died on 10th December, 1868, and this action has been raised and is insisted on at the instance of the mother's father, as having all the rights in reference to the custody of the child, and to maintain it at the father's expense, which the mother of a bastard has.

The Steward does not know, and the petr. has not cited, any rule or authority supporting this claim. He thinks the law applicable to this case was correctly laid down in the Court of Session in the recent case *Taylor v. Wilson*, 4th July, 1865, 3 Macph. 1060. There it was observed from the Bench (by Lord Cowan) that "the right to the custody of an illegitimate child is, in my opinion, a right peculiar to the mother. It has never been extended after her death to her relations." Lord Benholme, too, held it erroneous to maintain that the mother's relations had the same privilege of custody of the child as the mother has, observing that, "The preference which a mother has to the custody of her infant child rests on very strong considerations in nature, which do not apply to any other person. That claim on her part is entirely personal to herself;" and Lord Neaves concurred.

Act.—Robert Broach, Solicitor, Dalbeattie.—*Alt.*—John Johnston, Solicitor, Kirkcudbright.

SHERIFF COURT OF FORFARSHIRE, DUNDEE.—Sheriff J. GUTHRIE SMITH.

M'VIE, Petr.—Nov. 16.

Act of Grace—Rate of Aliment.—In this application for aliment under the Act of Grace, the S. S. allowed aliment, and fixed the rate at 1s per day, the customary rate in Dundee. The incarcerating creditor appealed, and the Sheriff, after hearing parties, altered the rate to 8d per day, adding to his interlocutor the following

Note.—The Sheriff is not satisfied that the general rate of aliment should not be 6d per day, which is stated to be the rate for civil debtors in Perthshire and Fifeshire, but he has allowed 8d per day in this case. Civil debtors are not entitled to maintenance higher than is allowed to paupers, which they are. If this party can earn 16s a week, he can easily arrange to pay his creditor 5s or 6s a week out of his earnings.

Act.—Paul.—*Alt.*—More.

SHERIFF COURT, LANARKSHIRE, GLASGOW.—Sheriff BELL.

HUGH BLACK & SON'S SEQUESTRATION.—*Jan., 1870.*

Bankruptcy—Competition for Trustee—Personal Disqualification.—At the meeting for the election of trustee there were proposed for that office, G. C. Moscrip, accountant in Glasgow, and C. C. Gray, formerly an accountant there. There was an apparent majority for Gray. Moscrip lodged a note of objections to the votes for Gray, and in addition objected that, at the meeting for the election of trustee, Gray openly bargained and engaged to act as trustee without remuneration for his services, and obtained the support of certain of the creditors on that understanding, while he likewise bargained and engaged with Alexander Alexander, a creditor acting as such, and as mandatary for creditors, that on condition of receiving his support in the election, he (Gray) would appoint him to wind up the affairs of the bankrupts in Stewarton, and remunerate him accordingly.

The Sheriff pronounced an interlocutor on 29th December, 1869:—Before farther answer, allowing the competitor Moscrip a proof of the averments on which his personal objection to the competitor Gray was founded, and to Gray a conjunct probation, and of mutual consent dispensing with any written record of the evidence to be adduced.

On proof being led for Moscrip, the procurator for Gray gave in a minute admitting the statements contained in the personal objection.

Thereafter, the Sheriff (Bell) pronounced the following interlocutor:—

Glasgow, 3d January, 1870.—Having considered the notes of objections for George Clement Moscrip, accountant in Glasgow, and heard the procurator for him, and for Colin Campbell Gray, manufacturing chemist in Glasgow, competitors for the office of trustee on the sequestrated estates of Hugh Black & Son, bonnet manufacturers in Stewarton, as a company, and Hugh Black and Robert Black, the individual partners of said firm, as such partners and as individuals; and having also considered the minute of admission for the competitor Gray, written of this date on the margin of page 2 of Moscrip's note of objections; in respect thereof, and for the reasons stated in the annexed note, sustains the personal objection to said competitor Gray, and finds him ineligible to hold the said office of trustee on said estates; but in respect it appears by minutes of the first general meeting of creditors No. 14, that no objection to Gray's eligibility was stated at said meeting, finds that a new meeting for the election of trustee now falls to be held, and appoints the creditors to hold a meeting for said purpose accordingly, etc.; Finds the said competitor Gray liable in the expenses of this competition, which taxes, etc.

Note.—At the diet of this date, fixed for taking the proof allowed by the preceding interlocutor, a minute was given in for the competitor Gray, admitting that the statements on which the personal objections to his eligibility are founded, were correct. The statements are—that at the meeting for the election of trustee, he (Gray) openly bargained and engaged to act as trustee without remuneration for his services, and he obtained the support of certain of the creditors on that understanding, while he likewise bargained and engaged with Alexander Alexander, a creditor acting as such, and as mandatary for creditors, that on condition of receiving his support in the election, he (Gray) would appoint him to wind up the affairs of the

bankrupts in Stewarton, and remunerate him accordingly. It thus appears that Gray obtained certain votes for himself by promising good deeds and rewards, the doing of which was held in the case of *M'Gowan and others*, 13th Dec., 1808, F. C., to operate as a total disqualification of the party so conducting his canvas for the office of trustee, and the Sheriff feels bound to follow that authority in the present instance.

Act.—Alexander Dick.—Alt.—Miller & France.

English Cases.

CONSIGNOR AND CONSIGNEE—*Acceptance of Bill of Exchange sent with Bill of Lading.*—Plt., a merchant at Manchester, sent an order to P., N. & Co., at Pernambuco, to purchase on his account cotton, upon certain terms. P., N. & Co. accordingly purchased and shipped cotton in deft's vessel, and wrote to plt., saying, "Inclosed please find invoice and bill of lading of 200 bales of cotton. We have drawn upon you in favour of our agents, to which we beg your protection." The invoice, which was headed "on account and risk of S. & Co." (plaintiff), was sent to plt. as stated in the letter; the bill of lading, however, which made the cotton deliverable to order or assigns, was not inclosed therewith, but was sent to the agents of P., N. & Co. together with a bill of exchange drawn for the price of the cotton. The agents thereupon wrote to plt. enclosing the bill of lading and the bill of exchange for which they requested protection. Plt. retained the bill of lading, but returned the bill of exchange unaccepted, on the grounds of non-compliance with the terms of the order. On presentment of the bill of lading to defts. they refused to deliver the cotton, having been advised of the circumstances under which plt. became possessed thereof, who thereupon sued them in trover:—*Held*, (aff. judgment of the Court of Q. B. upon a case embodying the above particulars and empowering them to draw inferences of fact), that the acceptance of the bill of exchange was a condition precedent to the passing of the property, and that this having been refused the defts. were justified in withholding the cotton.—*Shepherd v. Harrison*, &c., 38 L. J. Q. B. 177.

INSURANCE—Concealment—Port or Ports—Port unknown to the Underwriters.—Plaintiffs effected a policy of insurance with deft. on a vessel "at and from Buenos Ayres, and port or ports of loading in the province of Buenos Ayres to port or ports of discharge in the United Kingdom," knowing at the time that the vessel was to go from Buenos Ayres to Laguna de los Padres, a port in that province, but not communicating that fact to defendant. Laguna de los Padres was, at the time the policy was made, a port unknown to underwriters as a place of loading, and underwriters knowing that a vessel was to load there, would require a higher premium than that charged for the insurance effected with the defendant. It had no artificial port or mole, but only a wooden jetty or pier, and a slaughter-house; vessels have to anchor about a quarter of a mile from the shore, in the roadstead (which is protected by natural headlands on either side, which form a kind of bay), and to load and unload by

means of lighters and small craft plying between the vessels and the jetty. There is a regular trade between it and Buenos Ayres, but not between it and Europe, and by the custom laws of the country vessels sailing outwards from Laguna de los Padres are compelled to return to Buenos Ayres to clear. The vessel sailed from Buenos Ayres to Laguna de los Padres; but being unable to get a complete cargo there, proceeded to return to Buenos Ayres, for that purpose, and was lost before reaching that place. In an action against the underwriter on the policy of insurance: *Held*, (1) that Laguna de los Padres was a port of loading within the meaning of the policy; (2) that the vessel's attempted return to Buenos Ayres for the purpose of completing her cargo was not a deviation; and (3) that the concealment from the underwriter of the intention that the vessel should go to Laguna de los Padres was not such a concealment as vitiated the policy.—*Harrower v. Hutchison*, 20 L. T. Rep. N. S. 556; 38 L. J. Q. B. 185.

LIBEL—*Evidence of publication*—*Authority to publish given to agent*—*Liability of principal*—*Distinction between civil and criminal proceedings*.—In an action for libel plaintiff complained of the publication in certain newspapers of reports of proceedings of a board of guardians containing defamatory statements concerning himself. At the meeting at which the proceedings in question took place reporters were present in the discharge of their duty as representatives of the newspapers. One of the defendants was chairman of the meeting, and the other was present and took part in the proceedings. The latter said that he hoped the local press would take notice of "this scandalous case," and requested the chairman to give an account of it. This he accordingly did, and in the course of his statement said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." The other defendant thereupon said, "And so do I." The reports complained of were afterwards inserted in the newspapers, being somewhat condensed but substantially correct accounts of what had been said at the meeting. These reports were set out in the declaration, and constituted the libels complained of. The Judge at the trial directed a verdict for the defendants, on the ground that there was no evidence of a publication by them of these libels, to which direction plaintiff excepted:—*Held* (per *Keating, J., Montague Smith, J. and Hannen, J.*, disa. *Byles, J. and Mellor, J.*), that the direction was wrong, and that there was evidence for the jury. Per *Byles, J.*—There is a distinction between the authority which will make a man liable criminally and that which will make him liable civilly for the acts of another. Per *Keating, J., Montague Smith, J. and Hannen, J.*—The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be to some extent those of him who makes such summary or outline, and he must be taken therefore to constitute him an agent for the purpose and be answerable for the result, subject to the question whether the authority has been really followed.—*Parkes v. Prescott*, (Ex. Ch.) 38 L. J. Ex. 105.

THE

JOURNAL OF JURISPRUDENCE.

THE DIGEST COMMISSION.

It is understood that the Digest Commission have passed a sentence of dissolution upon themselves. Whether, and if so in what form, any new body may be constituted for a similar object, it is premature to speculate. But, assuming that the purpose of consolidating and digesting the law has not been finally abandoned by those in authority, we propose to consider, from a practical point of view, the question:—What kind of digest or code is desiderated in England, and how far is the supply of this want at the present time practicable?

It is believed that the open competition some time ago offered by the Digest Commission has completely broken down. We refer to this, not for the purpose of reflecting upon the wisdom of the course adopted in proposing such a competition. It may have been vain to imagine that persons of high qualifications for the task would descend into the arena to compete for the prize offered;—the *possibility* of being admitted to co-operate in a scheme for the serious prosecution of which no guarantee was offered. But greatly as the Commissioners presumed on the leisure of the junior bar, it was rumoured that the responses to the appeal were not inconsiderable in number, nor entirely disconnected with names of some professional standing and repute; and this circumstance, if it be true, manifests a state of things that has an important bearing upon the question we have undertaken to discuss. It is a state of things not for the first time disclosed to any one having an adequate knowledge of English law and English lawyers. We refer to the absence, on the part of the legal profession in England, of any systematic conception of the science of law as a whole. There are, in plenty, skilled draftsmen, conveyancers, and pleaders. There is good practical sense brought to bear in the Admiralty Court, shrewd knowledge of business at *Nisi prius*, readiness and insight into character in the Criminal and Matrimonial Courts, and corresponding argumentative power in all the Courts. But, with certain notable exceptions, it is difficult to find an English lawyer

having even a moderate acquaintance with all parts of the legal system, and still more difficult to find one capable of defining in clear intelligible language the meaning of the legal phrases which pass current in the language of the forum.

But whatever be the state of juristic attainments at present prevailing amongst English lawyers, the general intelligence and ability of the body is so vast, that if persons in authority should make up their minds clearly and definitely as to what is desiderated and what is practicable, it cannot for a moment be supposed that the English legal profession is incapable of making the result forthcoming. We are aware that this "if" is a large one, but we do not despair of the result being accomplished. Something at least has been gained by the tentative labours of the last few years. The report of the Judicature Commission shows that boldness and largeness of views in law reform is not wanting amongst Judges who have well earned the confidence of the public by patient and rigorous administration of the law as it is. And it must be remembered that the Digest Commission, if they have hitherto failed in producing any great result, have been hampered from the outset by a limitation of means within an amount which would barely have guaranteed a publishing firm in producing a considerable text-book modelled upon any new principle of arrangement.

In order to approach the question of what is wanted, it is necessary clearly to conceive and state the nature of the inconvenience which results from the existing form of English law. The object aimed at is to improve the *form* while substantially preserving the existing matter of the law. Now, the inconvenience arises not merely from the enormous bulk of the law. It arises rather from the extraordinary complexity of the system—if system it may be called,—the redundancy of indifferent authority, and the changed bearing of old cases upon laws which are administered under an altered procedure.

We believe most people are agreed upon the notion of what an ideal code is. It would be the statement in clear, pithy, and accurate language of a set of rules or principles supplying the means of ascertaining with certainty and despatch the legal consequences of every conceivable combination of circumstances. Now, of course this ideal is unattainable. Circumstances being indefinitely various, it is impossible to supply a rule for all circumstances.

The question is—Is it possible to supply a greater approximation to this ideal than is supplied by our existing law libraries as they are; and that without substantially innovating upon the matter of the law? This last qualification we have added as an essential part of the problem at the present time. The country is, perhaps, not prepared for having the question of substantial amendment of the law mixed up with that of *codification*. Innovation there must be; innovation of the same kind as that acknowledged to be within the function of a Supreme Court of Appeal in deciding between conflicting authorities. We think there ought even to be contemplated innovation greater in degree than Courts of Appeal have usually allowed themselves, provided

such innovation is intended solely for the purpose of improving the *form* of the law, and not for substantial amendment in the *matter*. Even such innovation as here contemplated will require statutory authority; but we believe it to be essential to the efficiency of the work to be done, that the work when complete should obtain some kind of sanction from the Legislature.

Now, we are convinced that without substantially (in the sense above explained) innovating upon the *matter* of the law it is possible to obtain an approximation to the ideal code above described, which may, in every respect, be superior to that supplied by the existing law libraries. That is to say, this is possible within reasonable time and cost; for, of course, these are conditions of the problem. Does any lawyer look round upon his well-filled bookshelves, and despair of reducing all that learning within a moderate compass? After all—after subtracting Vesey and Hare (the repositories of Eldon's *doubts* and Wigram's decisions), and a comparatively small selection from the remaining shelves of reports—what a mass of inconsistent rubbish do the volumes of Chancery reports contain! And as to the common law reports, do not three-fourths of the old cases depend upon questions of pleadings now obsolete, and a good part of the remainder, of hopeless conflicts of authority between the various Courts, and that oddest of Appeal Courts—the Court of Exchequer Chamber?

Now, the mere publication of a selection of reports by a body having power to decide between conflicting authorities, would be a considerable boon to the profession. But if such a body confined their work to the selection of cases and the determination between authorities, they would have given the public a very small boon. While apparently abridging the bulk, they would have done very little towards improving the *form* of the law. Mere selection and abridgment of case law, although a useful work, is not the *desideratum*.

The expurgation and consolidation of statute law is also a work of great utility; and as a good deal has been already done, and is still going on, in this direction, we shall not go more at length into this part of the subject at present.

What is really urgently needed for the law of England is an *authoritative Institute* or comprehensive text-book of the whole law. This, no doubt, would be a greater and more difficult work than either the digesting of case law or the consolidation of statute law. But we believe that such a work is not impracticable, and that it may well progress simultaneously with any work of the other kind that may be considered expedient. The object of such a work would not be to cover the *whole* field of law, but to define and systematise the matter contained in the books of larger bulk. The clear and succinct statement of principles which are now only implicitly contained in decisions, and their arrangement in a systematic order, would be the means of preventing much litigation and controversy which now arises from the fact that legal propositions and contentions which are absolutely untenable, receive so much countenance from existing decisions and *dicta* that they

may be plausibly put forward and argued. How often, for instance, does a suit arise because some aberration of expression by a Judge in a reported case has suggested so much doubt that trustees are *advised* they cannot act *safely* in a matter in which there ought never to have been the semblance of a doubt!

It will be objected that the work we have suggested will only be an addition to, and no better than, the existing text-books. We answer, that if so, its superior *authority* would be an advantage. But we think the mere fact of the work being undertaken with authority might give those engaged in it an advantage with which private enterprise could not compete. It only requires a glance at any of the existing text-books to see how the writer is shackled and paralysed at every point by the conflict of authorities that make it scarcely possible to enunciate with confidence the most simple legal proposition.

Another consideration will tend to show how the task of an authoritative institute may be simplified. We have hitherto, according to the usual language, spoken of case law and statute law as the two main divisions of law in point of form. What makes it important to keep this division clear, is the great distinction between the *ratio* of interpretation applicable to laws under these respective forms. An authoritative institute may partake of the nature of both—always providing that it is made clear to which form the respective parts of the institute are intended to be referred. Such is the method employed in the instalments of a code for India published under the authority of the Royal Commission for that purpose, which consist of statements of *principles* illustrated by *practical examples*. But there is a division of the field of law itself which will help to confine within a limited compass the work to be done by an authoritative institute.

This is the well-known division proposed by Bentham of *general* and *special* codes—a division identified by Austin with the division intended by the Roman lawyers under the terms *Jus Rerum* and *Jus Personarum*. The actual limits of the distinction are perfectly arbitrary and depend on convenience merely. The most convenient limits will correlate to some degree with the distinction between case and statute law. This is a mere accident, perhaps; but it is a circumstance which will aid the formation of an institute or general code, as it will tend to make such an institute homogeneous.

The matter, then, of the General Code or Institute would be general law, or that department of law called by Austin "the law of things." It would include case law built up by decision, other than that merely interpretative of statutes belonging to the department of special law; and it would include such statutes as those relating to marriage, real property, mercantile law, distribution of the estates of intestates, trusts and trustees, etc.; that is to say, all statutes by which everybody is or may be affected, or by which very large classes of persons are affected in the common relations of life. The line of demarcation is arbitrary, as already stated. These statutes would not, of course, be embodied at length in the institute, but the institute could contain a

brief *resumé* of such statutes in treating of the topics to which they relate, and would refer for further information, to the statutes themselves.

Special or particular Codes are merely statutes relating to particular classes of persons, or not of such general application as to be conveniently included in the scope of the General Code. The only improvement which could be suggested upon the form of this branch of the law is, that statutes relating to the same subject should from time to time be consolidated and amended, having regard to the legal decisions which have been made interpretive of them. The Legislature, at the instance of Government, under the advice of their able Parliamentary Counsel, have lately done and are still doing some good work in this direction, and such work might be effected to a larger extent by a development of the system now pursued, or by some arrangement of a similar nature.

But what we think urgently called for is this:—That in addition to, and simultaneously with, any attempt to re-arrange, distinguish the authority, or reduce the bulk of the existing case law, the task should be committed to a *few* competent persons of preparing the draft of a General Code or Institute of the law of England, to the intent that such draft may be considered and settled by a more numerous body of experienced lawyers, or other persons, and may when so settled be submitted to Parliament for their approval and sanction.

R. C. .

THE LAW COURTS COMMISSION.

THE publication of the third report of the Law Courts Commissioners has begun to recall public attention to the important subject they have had to deal with. The rumour which gained some credit a few weeks ago, that their deliberations have brought the Commissioners to think that the Sheriff Court should have co-extensive jurisdiction with the Court of Session, and should continue to be presided over by two orders of Sheriffs, may be supposed to belong to the class of intelligence which is important, if true. By what process of reasoning such a result could be reached; by what majority—how large numerically—or how composed personally,—it could be adopted,—are questions interesting, but at present idle. It is proposed, at present, to glance at the general character of the evidence which has been published by the Commissioners, and with which their recommendations, whatever they prove to be, may be presumed to bear some correspondence.

Two things, however, must be kept in view, which qualify its importance as material for the judgment of the Commissioners. In the first place, it is understood that statistical information has been carefully and judiciously collected, which will throw considerable light on the working of the judicial system—a light which may probably,

and easily, be, in the Baconian sense, dryer than that contributed by some living luminaries. The second point to be borne in mind is more general, but not less substantially important in the present case. A Commission, and least of all this Commission, does not decide exclusively on the evidence led before it; the Commissioners are witnesses as well as jurymen. This is, in some degree, true irrespective of the relative experience of the inquirers and the value of the evidence; it must, of course, be doubly true where the Commission is a large one, which itself contains the very best witnesses on the subject it has to investigate. The evidence taken is, therefore, only one element for the consideration of the Commissioners; whether it is an important element or not must depend on its own value. And after perusing the three volumes, we have come to fear that the Law Courts Commissioners cannot find their individual responsibility much abated by the accumulated information of the last twelve months.

The first volume contains 386 pages, weighs 36 oz., and sells (or sold) for 4s.; the second contains 176 pages, weighs 20 oz. and sells for 2s.; and the third is a little larger and dearer. We are disposed to think their value is in the inverse ratio to their size and price,—that the second is much the most valuable, and that if the first were to share the fate of some of the works of Livy, the history of jurisprudence would recover the loss.

The first volume treats chiefly of the Sheriff Court, its constitution and procedure, and contains the evidence of four (Sheriffs to whom may be added two ex-Sheriffs, who are now Lords of Session), six Sheriff-Substitutes, and eighteen Sheriff Court procurators. Besides these, there are witnesses who speak to the procedure in other Inferior Courts, but with them we have not now to do. It might naturally be expected that the personal experience of all these Judges and practitioners would necessarily enable them to present the Commissioners with much that is various and valuable. And we cannot think it has done so. There is no doubt this excuse for much of the Blue Book being uncommonly bad reading that, perhaps from inexperience of such duties, some of the Commissioners would never allow a witness to finish what he had got to say on one subject before he was tackled with another. The result is a singular jumble of things civil and criminal, important and trivial. Just as impatient electors interrupt a parliamentary candidate's exposition of the Irish Land Question with cries of "How about the license on shepherd dogs?" so the question of the Double Sheriffship or Jury trial is occasionally enlivened by a Commissioner interjecting an inquiry as to Extraordinary Removings or the Aliment of Civil Prisoners. But apart from this practical difficulty in the way of readers, for which the witnesses are not responsible, and from others due to idiosyncratic confusion, the bulk of the evidence is open to much more radical objection. Encased in a great deal of leather and prunella, there are presented on the main questions under discussion, the Double Sheriff-

ship and the Sheriff's jurisdiction, simply two antagonistic opinions supported invariably by the two conflicting interests concerned; and it is only by virtue of the superior dialectic and cross-examining power of the Commissioners that any facts or objective results at all are arrived at. The dismal sameness or rather uniformity of the "opinions" and "suggestions" is seldom relieved by any variety in the experience or illustrations by which they are enforced. Opinions, and not the grounds of opinions, are what is volunteered. In too many cases these opinions are supported by authority which personal courtesy cannot be strained into describing as considerable, and in some by ostentatious references to the unanimous resolution of bodies to whom we do the justice of supposing that they never seriously considered the propositions fathered upon them. We will give an instance of what we mean.

Opinion is undoubtedly seriously divided as to the Double Sheriffship, and we are not of those who consider its maintenance a vital principle. But there can be no question at all that its best friends have proved to be those who, in singular ignorance of their own business, identified its abolition with the establishment of the tribunal which, after being referred to in a perfect crescendo of contemptuous *aliases*, was ultimately, and in apparent good faith, described by Lord Colonsay as the Perambulatory Court. Whatever else has been proved or disproved by the inquiry, the case for the Perambulatory Court has signally broken down, or rather it has simply disappeared. There are reasons for each of the many things desired by Sheriff-Substitutes and country procurators, but none for this; the direct appeal to the Court of Session, the formation of a general body of agents, increased salaries on the bench, increased fees at the bar; all have been supported by strong arguments—this by none but weak ones. And yet a little management or urgency had put some of the authors of this project in a position to depute that the legal public throughout the provinces had made up its mind in favour of it. We do not think the legal public throughout the provinces will rise in arms if the Commissioners omit to mention this fact in their report.

This, where witnesses professed to speak for other people;—the characteristic of the individual opinions is easily stated. All the Sheriffs are for the Double Sheriffship; all the Substitutes are against it; and most of the procurators side with the Substitutes. The same tests will enable any one, by reading the designations of each witness, to form a pretty good idea of his views as to the Sheriff deciding questions of heritable right, or sentencing to penal servitude; as to the monstrous delay and expense of the Court of Session, or the deficiencies of Sheriff Court records. On questions of civil procedure there are of course some excellent practical suggestions made by gentlemen on the bench and at the bar in the Sheriff Courts; and we can imagine the Commissioners doing good service to the country were they to confine themselves to the unambitious task of carrying into effect the many, and, in the aggregate, important im-

provements in details of law and process which have been submitted to them. What is said of our criminal system, too, is interesting and good in its way, though it supplies more reason for congratulation than for change. But on the constitution of the Sheriff Court and its jurisdiction we cannot account the published evidence to be of value, and we do not intend to criticise it in detail. If a motto had to be selected for the volume, the candid avowal of one gentleman, which is to be found in question and answer 6819, would seem to be the right one: "Your object is to keep things to yourselves as much as possible?—As much as possible."

The evidence taken as to the English system of judicature, although the legislation proposed by the Lord Chancellor may soon render some parts of it obsolete, contains much information that is valuable, and none that is not entirely relevant to the subject of the Commission inquiry. The witnesses had been most judiciously selected, and it is impossible to read what they say without seeing that they are able and practical men. We do not refer principally to Baron Bramwell, although his testimony is given with as much character and incisiveness as Mr Fraser's, and consists of a lucid and impartial explanation of common law litigation. The officials of the various Courts contribute an immense number of instructive facts as to procedure, pleadings, costs, etc.; and the Commissioners had also before them one or two agents of much sagacity and experience, as well as barristers of considerable repute. On some of the points on which those of the Scotch witnesses who are, to put it temperately, not optimists regarding their own country, had appealed to the English practice, we do not think they will find themselves borne out either by facts or prevailing opinion. Much, for instance, has been said about the County Courts as an example sustaining the argument for aggrandising the Sheriff Courts by transferring the bulk of litigation from the Supreme Court to them. Yet the fact is that the jurisdiction of the County Courts is more limited than that of the Sheriff Court is at present, and its business very much less important. Indeed, the resort to the Supreme Court is so universal that, as Mr Cheere, the Registrar of the Middlesex County Court mentions, very much the most of the cases he has to deal with are under £10 in value, while the equitable jurisdiction recently conferred on the County Courts is scarcely ever resorted to. It is also to be observed that their heritable jurisdiction is limited to subjects of the annual value of £20, which is considerably lower than that suggested for the Sheriff Courts by the *consensus* of authorities in the first volume of the evidence, and that even this will be a fair precedent only when the success of the Lord Advocate's Feudal Tenure Bill confers on Scotland the doubtful advantage of a "simple" system of title.

Another fallacious comparison between the Scotch and English systems is set right, or rather is exposed, by the English evidence. It is quite clear that gentlemen who are opposed to the whole system of jury in civil causes are quite inconsistent in crying out for the

expeditiousness of English procedure—it is just jury trial that causes the greater speed of Westminster Hall. Indeed, in spite of the fact that the majority of the witnesses, Scotch and English, have opinions (or the usual substitute for opinion) hostile to jury trial, we think the facts elicited throughout the inquiry, are, on the whole, largely in its favour. What is proved as to its practice in England is that it is a speedy, elastic, cheap, final, and popular method of settling lawsuits; and if these virtues are not recognised in Scotland, it is merely because the system has been enormously and scandalously misunderstood and bungled. All, however, that has made jury trial with us a scandal and a farce is remediable, unless it be too sanguine to count on our having what is certainly a *sine qua non* to its success, tolerably strong Judges.

The duties of the officials most nearly corresponding to our Clerks of Court were naturally the subject of inquiry in connection with the proposal to impose on the clerks the responsibility of making up the record and disposing of incidental applications. It appears, as was indeed well enough known, that the gentlemen who in England undertake such duties are in some cases barristers and in others solicitors, and their salaries indicate that they are not selected from the stragglers of these professions. Moreover, it cannot be said that the extensive powers which these officers exercise in Chancery cases are looked on with general approval by lawyers, some of whom prefer the direct interference of the Judge. But the evidence on the subject is well worth perusal, and shows how various and numerous are the questions thus disposed of, and also how entirely foreign the system is to our present practice.

The remainder of the second and the third volume, treat of the constitution of the Court of Session and its procedure, the various offices connected with the Court, and Teinds. Criminal matters and the Dean of Guild Court also occupy some attention. On the constitution of the Court of Session two conflicting opinions obtain—the alternative to the present system being the abolition of the Outer House and the formation of three Divisions (Mr Kermack says four, but a little variety is inevitable). The Judges and Advocates examined consider a single Judge to be the best tribunal in the first instance, and the tendency in England, as illustrated in recent proposals, is, of course, in the direction of approving that system. From the opinions expressed in the opposite sense, we confess we miss one important explanation. Many of the gentlemen who dislike the Outer House are also strong advocates of changes which would convert the Court of Session pretty much into a Court of Appeal;—surely they were bound to say whether it is in this view that they would abolish the single Judge in the first instance. Obviously the machinery of a Court of Appeal is very different from the machinery of a Court which is intended to try all but the more petty causes of litigation; and those who think the Court of Session should merely review on questions of law the decisions of the Sheriff will have very different views of what is its proper constitution from

those who desire to see it the Court of national and popular resort. No doubt the witnesses who have proposed the formation of three divisions have their plan for making up records by the intervention of the clerks, but that plan is not so complete and coherent as to remove the suspicion that some of its partisans contemplate that the number of records made up in the Court of Session should not require a very large staff of officials. Between these two views of the proper work of the Court of Session there is so wide a divergence that it is idle to talk as if the same object were contemplated by the adherents of both—they contemplate exactly opposite objects. Accordingly, until we know what a witness thinks about the proper jurisdiction of the Court, his opinion as to its proper constitution is simply unintelligible, and in the case of several gentlemen whose evidence is published in the third volume, we are destitute of this clue. Some of the reasons stated, indeed, stand well enough, apart from those we have indicated, whatever their separate cogency may be. Strong representations are thus made of the delay, the expense, and the insufficiency of the debate in the Outer House, and it is treated as, at least in connection with present arrangements of counsel, a positive evil in itself. Yet it cannot but be observed, even while we admit that such complaints are not groundless, that the experience which is referred to in support of them generally proves to be that of an agent or a litigant who would in no event rest satisfied with an Outer House judgment, and is derived from cases where the magnitude of the status or the temper of the parties makes them regard anything that stands between them and the judgment of the Inner House, or, for that matter of it, the House of Lords, as merely an aggravating and expensive obstruction. Any such stand-point necessarily leads to a very partial and unjust view, and until the statistics are published we can venture to do no more than say that this very Blue Book contains proof that the most erroneous views are sustained by agents whose experience has happened to be confined to heavy cases, of the number of judgments of the Lord Ordinary which are acquiesced in. The proportion is very large indeed.

The witnesses who speak of procedure are unanimous in testifying to the great improvement effected by Mr Gordon's Act. Much is said, that is useful, of the stage of litigation that was until lately sat so heavily upon by the now happily departed Summary Debate Roll. The usual opinions are expressed in the third volume as to the modes of taking proof; that is to say, jury trial is strongly condemned by the chairman of a railway company and others; proof before the Lord Ordinary is extolled by gentlemen who in the same breath complain of the expense of printing and the delays of the Inner House; and various suggestions are made as to shorthand writing and other matters of detail, some of which are likely to be useful and others unlikely to be mischievous. While there is a vast deal of repetition and much sameness, there is a good deal of matter in the third volume, and some very intelligent suggestions are made, which are briefly

stated, and which it would be out of place to catalogue here. If these were collected and given effect to, there would, as we said before, be a considerable advantage from the sitting of the Commission.

The evidence on criminal procedure is really of more importance and value to foreign lawyers than to ourselves, but it is well stated and comes from good authorities. The statements given by the Accountant of Court and Accountant in Bankruptcy of the work of the offices over which they preside, show satisfactory and certainly cheap work, while various possible improvements in detail are indicated. The evidence of the auditor is so important and in some respects significant that, should opportunity occur, we may revert to it. The Teind Court presents a question, the determination of which is pretty much independent of those affecting the Court of Session.

We have only at present to add that the Law Courts Commission seems to have done its duty hitherto—some of which cannot have been very proud or agreeable—in a thorough enough way. We hope it will now study to exhibit two virtues—courage and expedition. Time has already removed some of its members and changed the titles of more; governments have risen and fallen, and laws have been changed. Before long, any recommendations which the Commissioners submit may possibly bear small relation to the evidence they have taken. The reconstruction of the English Courts, the proposed abolition of the feudal tenure, should warn the Commission that it may prove to be itself one of the most stable of our legal institutions. A fate more worthy of its members and officials will be that it give new life to our judicial system in promptly submitting the report that will terminate its own.

J. R.

PAPERS OF THE SCOTTISH LAW AMENDMENT SOCIETY.*

ON THE EXPEDIENCY OF FORMING A DIGEST OF THE LAW OF SCOTLAND.

By JOHN DOVE WILSON, Esq., ADVOCATE,
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NEARLY four years ago a Commission was appointed by Government "to inquire into the expediency of a Digest of Law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." This Commission was composed of eminent men, partly English lawyers and partly laymen. Among the former were Lord Cranworth (who was chairman), the present Lord Chancellor, Lords Westbury, Cairns, and Penzance, and Sir Roundell Palmer; and among the latter were Mr Lowe, Sir George Bowyer, and Sir Thomas Erskine May. The Commissioners presented their first report in the

* The papers selected for publication by the Council of this Society will, by arrangement, be published in the *Journal of Jurisprudence*; but the Society is not to be understood as becoming in any sense responsible for the other contents of the *Journal*; and the conductors of the *Journal* do not assume any responsibility for the style or opinions of the Papers of the Scottish Law Amendment Society.

course of the year after their appointment.* In it they define the sense in which they understand the term "Digest:"—

"A Digest," as defined by the English Digest Commissioners, "would be a condensed summary of the Law as it exists, arranged in systematic order, under appropriate titles and subdivisions, and divided into distinct articles or propositions, which would be supported by references to the sources of law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been discussed or applied."

The Commissioners reported strongly in favour of having a digest, such as they defined, for England, and they gave this opinion, although they were fully aware that the preparation of such a digest would necessarily require a considerable expenditure both of time and money. In their report, the Commissioners also indicated the mode in which the preparation should be set about. No one can question the soundness of their opinion, that a work of the nature they contemplated "(regard being had especially to the importance of its carrying with it the greatest weight) could not be accomplished by private enterprise, but must be executed by public authority, and at the national expense." They accordingly reported that any plan for accomplishing the work "must involve the appointment of a Commission or body for executing or superintending the execution of the work," and "that whatever arrangement was adopted a certain number of functionaries must be employed at a high remuneration in the capacity of Commissioners, assistant Commissioners, or secretaries, and that there must be a considerable expenditure on the services of members of the legal profession, employed from time to time in the preparation of the materials to be ultimately moulded into form, by or under the immediate supervision of the Commission or responsible body."

Considering the large outlay that such a scheme as this would involve, the Commissioners thought it right to proceed with great caution. They therefore recommended that a portion of the digest, sufficient in extent to be a fair specimen of the whole, should be, in the first instance, prepared; and they asked the Government for authority to employ professional assistance in the preparation of this portion, under their superintendence. The report, when issued, was the means of bringing out an unanimous expression of public opinion in favour of the project. Government, accordingly, gave the authority requisite for the preparation of the specimen portions, and the Commissioners selected for that purpose three separate branches of law, namely, (1) the Law of Bills of Exchange, promissory notes, bank notes and cheques; (2) the Law of Mortgage, including lien; and (3) the law relating to rights of way, water, light, and other easements and servitudes. They invited members of the English bar to compete for the task of preparing them; and after an examination of the offers and specimens of

* First Report of the "Digest of Law Commission, 13th May, 1867. Presented to both Houses of Parliament by command of Her Majesty."

their work sent in by the competing candidates, they selected three barristers to whom they entrusted the preparation of the specimen portions. Mr Henry Dunning Macleod, well known in connection with his works on banking and political economy, was entrusted to prepare the portion relating to the Law of Bills of Exchange; the Law of Mortgages fell to Mr William Richard Fisher, the author of a standard treatise on that subject which has passed through two editions; and the Law of Easements fell to Mr John Leybourne Goddard, a barrister of six years' standing. It was after the middle of 1868 before authority was given to these gentlemen to proceed. None of the specimens have as yet been completed, and as the formation of such digests must involve much labour, it may be some little time yet before they can be given to the public. It is quite possible, however, that during next session of Parliament Government may be prepared to submit a scheme for preparing a Digest of the Law of England.

The Commission of 1866 directed the Commissioners, in general terms, to inquire into the expediency of having a Digest of Law; but the Commissioners have understood this to mean an inquiry into the expediency of having a Digest of the Law of *England*. Considering the way in which the Commission was composed, and the circumstances attending its issue, no fault can be found with the understanding at which the Commissioners arrived, however much we may regret that they left the case of Scotland out of consideration. What I now want to submit to you is, that what would be good for the law and people of England, would be good also for the law and people of Scotland, and that there ought, therefore, to be a Digest of the Law of Scotland as well as a Digest of the Law of England.

A glance at the materials of which the law of Scotland is at present made up, will show how much it requires setting in order. Our law is at present derived mainly from three sources—the Statute Law, the Institutional Writers, and the decisions of the Supreme Court.

The Statute Law is in as confused a condition as anybody could well imagine. We have statutes of which nobody can say whether they are in force or not; we have others which are in force, but which through long years have been so overlaid with decisions that nobody by reading them can tell their meaning; and others, again, that subsequent statutes have affected to unknown extents. Although our Statute Law is less in point of bulk than that of England, it is in a worse condition—nothing almost having as yet been done for it either by private enterprise or by public authority. We have no collection, such as that of Chitty, which arranges the existing statutes in the order of their subjects, and gives references which, at any rate, enable one to approximate to their meaning; and the Statute Law Commission has not as yet done for us more than make a beginning of the work which has been nearly completed for England—that of separating the statutes which can be enforced from those which cannot.

The learned treatises of the institutional writers (such as Stair and Erskine, who are regarded as something more than text-book writers,

and whose dicta are taken as authorities) are now to a large extent either obsolete or incomplete. Besides, their views occasionally conflict; their meaning is now often obscure to us; and there is often uncertainty as to whether a particular writer is to be taken as an authority on a particular point. A further source of difficulty arises from our recognising the Roman Law, on which the institutional writers found so much, as being still in some degree authoritative.

The judicial decisions are contained in some 250 volumes, of which, speaking roughly, about 150 may be said to contain original reports, and about 100 either duplicate or reprinted reports. In point of number the decisions may be somewhere about 30,000, and they extend over three centuries of time. This mass, formidable as it is, is in point of size not so bad as the 1300 volumes of English decisions, estimated to contain nearly 100,000 cases; but in every other respect the description given by the Commissioners of the state of English judicial law applies exactly in Scotland. "A large proportion of these cases are of no real value as sources or expositions of the law at the present day. Many of them are obsolete; many have been made useless by subsequent statutes, by amendment of the law, repeal of the statutes on which the cases were decided, or otherwise; some have been reversed on appeal, or overruled in principle; some are inconsistent with or contradictory to others; many are limited to particular facts or special states of circumstances furnishing no general rule; and many do no more than put a meaning on mere singularities of expression in instruments (as wills, agreements, or local Acts of Parliament), or exhibit the application, in particular instances, of established rules of construction. A considerable number of the cases are reported many times over in different publications, and there often exist partial reports of the same case at different stages, involving much repetition. But all this matter remains, encumbering the books of reports. The cases are not arranged on any system, and their number receives large yearly accessions, also necessarily destitute of order; so that the volumes constitute (to use the language of one of the Commissioners) "what can hardly be described, but may be denominated a great chaos of judicial legislation."

Such being the present condition of the sources of our law, judges and practitioners have great difficulty in ascertaining what it is; and to the general public, the task of endeavouring to see what is the law on any point is usually a matter of simple impossibility. Reliance has to be placed to a great extent on text books, and on the sort of index to the reports afforded by Shaw's Digest. I am not going to disparage the assistance which can be got from either of those kinds of works, but both have many deficiencies. The text-books have no authority, except what they derive from the reputation, if any, of their authors, and they do not cover the whole field of law. Then with regard to Shaw's Digest, it is admirable for the purpose for which it is intended—that of helping one to search for a precedent—but as an exposition of the law, it is useless. In these cir-

cumstances, I think it may fairly be said that a digest, such as the Commissioners propose,—to be from time to time carefully revised,—is necessary for the law.

I could not state the benefits that such a digest would bring with it, with anything like the clearness and force that the Commissioners have done, and I therefore crave permission to quote from the report a few sentences:—

“Such a Digest would be of especial value in the making, the administration, and the study of the Law.

“When a necessity arises for legislation on any subject, one of the principal difficulties, which those who are responsible for the framing of the measure have to encounter, is to ascertain what is the existing Law in all its bearings. The systematic exposition, in the Digest, of the Law on the subject would enable the members of the Legislature generally, and not merely those who belong to the legal profession, to understand better the effect of the legislation proposed. And there would be this further benefit, that new laws, when made, would, on periodical revisions of the Digest, find their proper places in the system, and would not have to be sought for, as at present, in scattered enactments.

“The Digest would be of great use to every person engaged in the administration of the Law. All those whose duties require them to decide legal questions in circumstances in which they have not access to large libraries or other ample sources of information, would find in the Digest a ready and certain guide. Counsel advising would be spared much pains in searching for the law in indexes, reports, and text-books; and Judges would be greatly assisted as well in hearing cases as in preparing judgments.

“The Digest would be most advantageous in the study of the law; for it would put forth legal principles in a form in which they would be readily appreciated, contrasted, and committed to mind, and thus substitute the study of a system for the desultory contemplation of special subjects.

“It is not unreasonable to expect that this condensation and methodical arrangement of legal principles would have a salutary effect upon the Law itself. It would give the ready means of considering, in connexion with one another, branches of the Law which involve similar principles, though their subject matters may widely differ. It would thus bring to light analogies and differences, and, by inducing a more constant reference to general principles, in place of isolated decisions, have a tendency to beget the highest attributes of any legal system—simplicity and uniformity.

“The persons charged with the framing of the Digest might be also intrusted with the duty of pointing out, from time to time, the conflicts, anomalies, and doubts which in the course of their labours would appear. Thus the process of constructing the Digest would be conducive to valuable amendments of the Law. These amendments would be embodied in the Digest in their proper places.

“Moreover, such a Digest will be the best preparation for a Code, if at any future time codification of the Law should be resolved on.”

Not less clearly and forcibly do the Commissioners state the duty of a Government to have the law which it enforces accessible to the subjects:—

“But great as are the advantages to which we have referred as likely to flow from the formation of a Digest of Law, the argument for it may, we think, be rested even on the higher ground of national duty. Your Majesty's subjects, in their relations towards each other, are expected to conform to the laws of the State, and are not held excused, on the plea of ignorance of the law, from the consequences of any wrongful act. It is in these laws that they must seek the provisions made for their liberty, for their privileges, for the protection of their persons and property, for their social well-being. It is, as we conceive, a duty of the State to take care that these laws shall, so far as is practicable, be exhi-

bited in a form, plain, compendious, and accessible, and calculated to bring home actual knowledge of the law to the greatest possible number of persons. The performance of this duty—a duty which other countries in ancient and modern times have held themselves bound to recognise and discharge—has, in this country, yet to be attempted.”

Hitherto we have been regarding this matter from much the same point of view as that from which the Commissioners regarded the case of England, as if Scotland were an entirely independent country, and I have been borrowing the language of their report to describe the benefits that a digest would bring to us, as well as the duty that lies on us to see that those benefits are obtained. But when we look at the intimate relations which bind Scotland to England, and at the great desirableness of assimilating the law of the United Kingdom, the benefits of a digest are seen to be much greater. If the digests of the Law of England, and that of the Law of Scotland, were prepared simultaneously, the requisite foundations for ultimate assimilation could easily be laid. There would be no difficulty in adopting the same arrangement of the law in both digests. The great divisions of the subjects would necessarily be the same; the subdivisions could (with due care) be made to correspond; and, in mercantile law, at all events, the parallel arrangement could be carried out almost to the minutest details. Even in those branches of the law, where there is not much appearance of similarity, I believe it would be of the utmost advantage to carry out, as far as possible, the same order of treatment, so that the legislator, the Judge, or the practitioner, might at once be able to compare the provisions made by the two laws for the constitution or protection of any particular interest. If this parallel arrangement were carried out, I think it would be found that the points on which the English and Scotch law agreed were far more numerous than those on which they differed; and that with careful adjustment the minor differences, once clearly brought out and set face to face, would admit of removal. In this way, when the last steps of all were taken, and the codes evolved from the digest, they could be made to embrace the law of the United Kingdom on all matters on which it was really desirable that the law should be the same.

If the value of having such digests, both to the respective laws of the two countries and to their future assimilation, be admitted, I cannot see any objection to proceeding with the Digest of the Law of Scotland, except either on the ground of expense or on the ground of the time being unsuitable.

As to the expense, I have no doubt that it would be considerable. A large staff of well qualified and duly remunerated professional men would have to be employed; but this expense would have to be incurred only once, and it should be worth while for the public to incur some expense to have their laws reduced to something like order, precision, and lucidity. The consideration of expense is not to be allowed to stand in the way of digesting the English law; and if the Law of England is to be put in order at the cost of the Imperial Treasury, I do not see why the same should not be done for the Law

of Scotland. It is not many demands that Scotland makes on the Imperial Treasury; and though we contribute less, a digest of the Law of Scotland, from the smaller extent of materials, might probably not cost so much as the English Digest; and if both digests were done under a joint Commission, it is just possible that some of the expenditure for the necessary machinery might be made available for both. Apart from those benefits to Scotland, which it is as well entitled to have as England, there could not be a more worthy application of the Imperial funds than in the preparation of parallel digests of the laws of the two countries, with the view to facilitate their ultimate assimilation, and to ultimately having but one system of law in the empire.

If this project is ever to be carried out, it should be set in motion now. If we wait till the arrangements for preparing the English Digest are completed, the opportunity for framing the two digests in a parallel fashion will be gone, and we shall, probably, be told to wait till it is seen what like the English Digest turns out. When the English Digest is published, we may be asked whether it might not do for both, and the probability would be that England would proceed to codification, irrespective of assimilation. The justice of having the Law of Scotland digested, and the propriety of having our digest and that of the Law of England done on the same order and system, are so obvious that I think if we were to make our proposal now, in good time, it could not fail to meet with success.

With respect to the way in which this proposal should be carried out, it will be found necessary in any event to have a Statutory Commission. This Commission might have two divisions, an English and a Scotch, making the whole Commission responsible for the order of treatment, and the division for each country responsible for the accuracy and completeness of the statement of the substance of its own law. Assistant Commissioners would be employed on the different branches, working under rules sanctioned by the Commission; and if due provision were made for the revisal, exchange, and comparison of the various works as they proceeded, I think that even in the first edition of the digest substantial harmony of order, and fulness and accuracy of statement, might be attained. But I need not enter into details, as no one can say that there are any insuperable difficulties to encounter. A question would arise as to the treatment of the Irish decisions. Probably as they do not profess to form a separate system of law, it might be sufficient that those of them which are of value should be embodied in the form of notes at the proper sections of the English Digest. There may, however, be reasons, of which I am not aware, for a separate digest of the Irish decisions; but at any rate some provision should be made for them, the learning which they doubtless embody should not be lost, and Ireland should, as much as England or Scotland, have the benefit of a methodical and accessible law. Meanwhile, however, our main concern is with Scotland, and I trust I have done something to show that such a digest as I have proposed would be of incalculable value, and that this is the time for making the proposal take practical shape.

Review.

Essays upon the Form of the Law. By THOMAS ERSKINE HOLLAND, M.A., Fellow of Exeter College, Oxford, and of Lincoln's Inn, Barrister-at-Law. London: Butterworths. 1870.*

THESE Essays, though written with special reference to the law of England, which, as regards form, is in a much worse case than our own, are worthy of the attention of Scotch lawyers. The leading ideas of the modern school of law reformers are no longer novel, but we have seldom seen the reasons for codification, and the method by which it should be carried out, put in a more distinct and business-like manner. The author's scheme is, that there should be separate digests of the English Case Law and of the English Statute Law, both of which should be consolidated as soon as practicable, and when both have been consolidated, united in a single code, a work which he does not contemplate as possible in this generation. Even the Case Law digest, he thinks, must occupy in its composition many years; the only part of the work he considers as capable of speedy accomplishment is the Statute digest, which might be published within a year or two, and consolidated throughout within two years from its completion. He deprecates the idea of the law of any other part of the British empire than England being included in the digests; whether there should not be simultaneous digests of the Laws of Scotland and Ireland, with the view of the whole being incorporated in a British code, he does not seem to have considered. Besides the principal essay on the Formal Amendment of the Law of England, the volume contains an historical article on the movement towards codification, which he shows, in the case of the Roman Law, scarcely went farther than the stage of a digest, except to a certain extent in the Institutes of Justinian; and in the case of modern Europe, was due to the ideas of the Revolution, though some fortunate monarchs have written their names on the codes. The essay on codification is followed by a specimen of a digest on the Law of Servitude, in which the Servitude of Light is treated in detail.

In the second part of the volume a series of papers with reference to the faults of the English Statute-book, and suggestions for correcting them, have been collected. This part is inferior to the first; and even making allowance for the author's apology, on the ground that they were written at different times for different periodicals, we must express our regret that a work intended to show the advantage of solidarity in execution, and lucidity in arrangement in legal work, presents itself in the guise of a congeries of review articles. However, we must be thankful for what we can get; the number of law

* This review was written before Mr Dove Wilson's paper on a Digest of the Law of Scotland was read to the Law Amendment Society. That paper will, we hope, soon be published in this Journal.

reformers of Mr Holland's ability is not great, and these essays are a valuable contribution to the subject, to be followed, we trust, by some more important work.

We have noticed this volume, not so much for its own sake, as for the purpose of pointing out the position in which the Law of Scotland stands with regard to codification. While in England the divergencies between common law and equity will render the work of reconciling the case law for the new digest difficult, and the number of lawyers* (*utriusque juris periti*) capable of performing it small, we have escaped this difficulty, as the Court of Session has, since its foundation, administered both law and equity. While in England the existing digests have been executed piecemeal, and extend over a large number of volumes by various compilers on different plans, we have in Brown's Synopsis and Shaw's Digest (as continued by Messrs Bell and Lamond) a compact and to a large extent uniform digest of all the cases decided in the Supreme Court from its institution in 1532 down to 1868. Although neither of these works can be pronounced perfect, the practising lawyer feels, oftener perhaps than he is willing to acknowledge, their usefulness, and their existence will be of considerable service when a more scientifically arranged and authorised digest comes to be prepared. Our statute law lies within comparatively small compass. The brevity of the Acts of the Scotch Parliament, due chiefly to the Lords of the Articles, whose political subserviency ought not to make us forget their practical usefulness, and which Bacon praised, has unfortunately not been imitated by the Imperial legislators who have written the continuation of the Scotch Statute-Book, but the bulk of the whole is trifling in comparison with that of England,† and both the part prior to and that subsequent to the Union has been carefully indexed. The works of Sir James Stewart and Lord Kames are indeed more than mere indexes, although they do not rise to the level of digests. That the law of Scotland will be digested, and either codified by itself or absorbed in that of England is now certain. The only questions are, how long this work, which intimately concerns the well-being of a large number of British citizens, will be delayed, and whether it shall be executed mainly by Scotch or English‡ lawyers.

It is strange indeed that the assimilation of the laws of bordering nations, speaking the same language, subject to the same crown, and whose manners and customs, not fundamentally different at the date of union, have daily become more similar through trade, travel, and

* Lord Westbury, in a recent speech in the House of Lords, declared that the common law was a "*terra incognita*" to the equity barrister, and *vice versa*, which the reporters, from the fineness of his pronunciation, reported as "*a perfect terror*."

† In the index to the Statutes, published by authority of Government, the English Statutes in force occupy 200 pages, the Scotch only 38 pages.

‡ The latter have already begun to put their hands to it. In the recently published Chronological Table and Index of the Statutes, the Index of those affecting Scotland has been done by two young Chancery barristers.

intermarriage, should have been so long retarded. The causes which have rendered this possible for two centuries and a half, and those which render it possible no longer, cannot here be explained. One word may be permitted as to the future—the expression of a hope that amongst the rising generation of Scotch lawyers will be found many fitted by education in the principles of jurisprudence, and a thorough knowledge of the details of Scotch law, to preserve in the future code what of permanent value has been accumulated by the great Judges and jurists to whom Scotland has given birth. No country has been more fortunate in its institutional writers—Stair, Erskine, Bell. Amongst the crowd of its Judges, too great, perhaps, for a small country, and too often appointed on political and personal grounds, and not from considerations of merit, to be all eminent, there have not been wanting some names, as Haddington, Stair, Lockhart, in the seventeenth century; Duncan Forbes and Ilay Campbell in the eighteenth, worthy to be ranked, if below, yet not far below, Somers and Hardwicke, Holt and Mansfield. It will be the fault of the existing members of the legal profession in Scotland, and especially of the Scotch Bar, if the result of the labours of their predecessors is lost to posterity. Their own contributions, it is to be feared, will not compensate for this loss. Æ. M.

Correspondence.

THE INFERIOR JUDGE AND HIS CRITICS.—No. 2.

SIR,—To my critic in the *Daily Review* (of July 12, 1869), I have, in the main, nothing but thanks to offer. Yet, from the midst of his most kind and courteous appreciation *surgit amari aliquid*. The point stirred is of some importance in this controversy; I shall resume it as briefly and clearly as possible.

An appeal to the Sheriff, in appealable cases, is the ordinary course. The Sheriff, for the most part, affirms the judgment of his Substitute. Both these facts I take as notorious.

As to the cases which are not appealed to the Sheriff, and the cases which being appealed are affirmed by him, these manifestly make nothing in favour of the so-called "cheap appeal." The cases not appealed have got no benefit from that source; the cases affirmed have merely been decided twice where once would have been enough. Yet I say this under reservation. Were the Appeal Court one of high authority and entirely separated from the Court below, the inference would be far otherwise, for reasons fully explained in my pamphlet; reasons which, on that account, I do not repeat here.

The utility of this "cheap appeal" therefore is limited to those cases in which the Sheriff reverses the judgment of his Substitute. Where he reverses *wrongly*, the appeal is worse than useless; it then is positive mischief. Consequently we must still deduct something from these reversals in bringing out a balance in favour of the existing institution, unless we assume that the Sheriff, altering his Substitute's judgment, is always in the right. What shall be the amount of this deduction? How shall we obtain the small *residuum* of utility on which the maintenance of the cheap appeal must finally rest?

If, on the whole, the Sheriff reverses the judgment of his Substitute as often

wrongly as rightly, I claim to set off the mischief done by a wrong reversal against the good done by a right reversal. To this principle of compensation there can, I presume, be no valid objection. If the fact then be as I assume it to be, if wrong reversals are as numerous as right ones, the result in favour of the "cheap appeal" will amount to *nil*.

To ascertain the fact, I turn to the only admissible standard, the fate of these reversals thus brought up into the Court of Session. But they do not all get there; a considerable number, the greater number, are never tried by that test at all. Can I from the tried cases make any legitimate inference as to the merit or demerit of the untried?

No, says my critic; to do so is blindly illogical. And so I reach the point on which we join issue. Are the reversals which reach the Court of Session a fair sample of those which do not; or does the fact itself of appeal to the Supreme Court introduce a differential element whereby my inference is necessarily vitiated?

On this point it is best to quote the words in which my critic forcibly puts his objection:—

"It must be remembered that the cases in which the Sheriff was obviously right would not be so likely to be taken to the expensive Appeal Court by the losing party as those in which he was, to all appearance, wrong. In other words, the judgment of the Supreme Court whom Mr Hallard accepts as arbiter in this matter, is here involved, not in all cases of difference of opinion between the upper and the lower Judge, but only in those cases where the dissatisfaction with the judgment pronounced by the superior is so strong as to lead to an advocacy. He selects only cases where the litigant is willing to back the opinion of the Sheriff-Substitute with his money; and it is perhaps not wonderful that of cases so picked, the half should justify the confidence expressed by the bold advocate."

Does this mean that a Sheriff's judgment, reversing the decision of his Substitute and acquiesced in, becomes by the mere fact of such acquiescence equivalent to a judgment confirmed by the Court of Session? Must it be added to the Sheriff's score in the sort of game which I have established between him and his subordinate? A judgment acquiesced in and a judgment affirmed are ultimately the same thing, so far as concerns the practical results of that particular case. Obviously they are not the same thing for the purposes of this argument. Nor do I understand my critic to say they are. And yet unless he can bring up his contention to that point, he takes very little by it.

For if he does not, he virtually admits that there are cases in which the Sheriff would be reversed and the Sheriff-Substitute would be set up, if the losing party would only become a "bold advocate." How shall we estimate the number of cases which, in that view, ought justly to be added to the score of the Sheriff-Substitute?

The Sheriff-Substitute has decided in my favour, the Sheriff has decided against me. I am advised that the case is a doubtful one; that the chances of success and failure are evenly balanced. The stake at issue is not large, and I have pressing uses for my money. I acquiesce, therefore. Such a case, and there are many such, goes to the score of neither competitor. It is a difference of opinion where such a difference might reasonably be expected. It strengthens my view that the result on the whole is a drawn game.

Of course there are cases in which a litigant is rightly persuaded by his lawyer that the Sheriff-Substitute's judgment in his favour was wrong; and that the Sheriff's judgment against him is right. Add these, by all means, to the score of the Sheriff. But are there not neutral cases like the one just mentioned; are there not also cases justly to be reckoned on the other side? My lawyer advises me to fight; but I have no time, or I have no money, or I am tired of litigation, or the stake is not worth my while, even although the likelihood be that I should ultimately prevail. A litigation in the Sheriff Court is bad enough; but it is a small thing as compared with the terrors of the Supreme Court.

Unconsciously my critic has suggested a good answer to his own criticism. The relative merits of Sheriff and Sheriff-Substitute may be taken as a tolerably fixed quantity; but what more variable element can there be than the means and temper of a litigant, and the value to him of the stake at issue? The Sheriff and Sheriff-Substitute are the constant factors, the "bold advocator" is the contingency, in this problem. Thus it is seen that the cases advocated are *not* picked cases; they are a chance handful taken out of the sack, a fair specimen, therefore, of its contents. If the cheapening of the process of review by the abolition of advocations should make appellants bolder than advocates have been hitherto (and there is evidence already to that effect), it will be interesting to watch the farther progress of what I have chosen to call the game between Sheriff and Sheriff-Substitute.

One word of warning. The validity or invalidity of the argument against the Double Sheriffship by no means depends on the victory of Sheriff or Sheriff-Substitute in this contest. The relative incapacity of the Sheriff-Substitute would, if it existed, be a sorry foundation for that institution to rest upon: worse even than the relative incapacity of the Sheriff with his much narrower sphere of mischief. Each Judge a good lawyer; each doing his best; generally a concurrence of opinion; a difference of opinion only where such difference might reasonably be expected; such is the Double Sheriffship in its best aspect, working under its most favourable conditions. No one, surely, can tax my argument with unfairness. I take the institution not at its worst, but at its best, as I find it to be in point of fact. Well then, at its best, it gives me this result; that in by far the majority of cases the Sheriff affirms the judgment of his Substitute, his reversals being as often for the worse as for the better. Down, therefore, goes the boasted utility of the "cheap appeal;" down with it the only plausible argument on which the defenders of the institution rely.

FREDERICK HALLARD.

COUNTRY AGENTS.

SIR,—In your article on "Rules of Professional Etiquette" in last number, it is stated that there is no rule which forbids counsel to hold consultations with any one of the public who seeks his guidance to draw papers, etc., but that expediency usually requires the employment of an Agent, an opinion which, I think, will be generally acquiesced in.


But in the case of a person employing a Country Agent to prepare a memorial for the opinion of counsel, is there not a rule which applies to the members of the profession only—that the country Agent must send the memorial to an Edinburgh Agent to be laid before counsel? The practice is as stated, and it will oblige if you will enlighten your readers whether such practice is founded on any rule.

I think it very hard that while a person can go direct to counsel and get an opinion without the intervention of an Agent, a party employing a Country Agent is also put to the expense of an Edinburgh one.

ALPHA.

[There is no such rule, and, in fact, counsel frequently give opinions on memorials sent by Country Agents.—*Ed. J. of J.*]

The Month.

 We regret that the notice of Lord Barcaple, which we expected to publish this month, is not yet ready. It will appear next month.

Mr Anderson's Bill as to Arrestment of Workmen's Wages.—It will be in the recollection of the readers of the Journal, that some months ago there appeared an article in our columns drawing attention to some of the more remarkable characteristics of Scotch diligence, and among other things strongly animadverting on that unfortunate peculiarity which permits of the arrestment of the working man's wages. At that time we hardly ventured to hope that this evil, great as it was, would be likely to find a remedy for a good while to come. We are glad, however, to observe that the evil in question has attracted the attention of Mr Anderson, one of the members for the city of Glasgow, and that he has introduced a bill into Parliament, dealing effectually and yet wisely with the subject.

As might be expected, the bill in question is almost certain to be opposed to the utmost of their ability by certain classes of dealers and clubs, who have hitherto derived very considerable advantages from the pull which this species of arrestment gives them over workmen; and there is reason to believe that they will not lack supporters among that well-meaning but ill-informed portion of the community who can see nothing to improve in existing institutions, and who regard every innovation as a synonym for a change to the worse. It may therefore not be out of place if we very shortly recapitulate the grounds upon which we have already ventured to condemn the system now sought to be abolished.

In the first place, then, the power to arrest a workman's wages tends directly to vest him with a fictitious credit, from which he derives no possible advantage, and by which the community in general suffers. It tends more powerfully than almost anything else to destroy habits of saving and economy—to lead the workman to enjoy the present, and to draw on the credit of the future. It destroys also habits of self-respect, for no sooner does a workman, in a moment of recklessness or dissipation, get into the books of his provision-merchant than he ceases to be a free agent. However ill he may be served, or at whatever price, he cannot change his merchant. If he attempts to do so, arrestment is at once laid on, and this in many cases will speedily compel his submission. Nor is it only the reckless or dissipated workman who suffers. The most steady men, if their wives mispend their earnings, get involved in this manner, often knowing nothing of what is going on until, after the lapse of weeks and months, they find their wages arrested for furnishings which they had all along believed had been regularly paid. This is probably the history

of a great majority of workmen who, in old age or failing health, have become chargeable to the parish.

To the employer the effects of the present law are a subject of constant and vexatious annoyance. He finds a third party continually interfering between himself and his best workman. If he makes an advance of wages to meet a pressing necessity, he runs the risk of having to repay to some arresting creditor, or can only escape from this by the annoyance of having to appear in the Small Debt Court, where his books require to be exhibited, and the most minute examinations are often instituted into the relations which are supposed to exist between employer and employed. In consequence of these evils it has become a rule in most large works that the moment an arrestment is laid on the workman shall be dismissed. That this rule, in many cases, operates harshly and unjustly cannot be disputed, yet it is difficult to condemn employers for taking the only means within their power to free themselves from annoyance. It must not, however, be supposed that this rule, however sternly enforced, always succeeds in attaining its object. Arrestments will still continue to be laid on, in the hope that something may be got, and even though the master is successful in disputing his liability, his success is dearly purchased at the cost of the annoyance to which he has been subjected. In point of fact, if the true sense of employers and employed could be taken on the matter, we are satisfied that both would unite in condemning the system and advocating its abolition as one of the greatest boons which could be conferred upon them.

Mr Anderson's bill seems to meet the evils complained of in the most effectual manner, without trenching on the right of arrestment in cases other than those of workmen properly so called. It provides that wages up to the extent of thirty shillings a-week shall not be arrestable, but leaves the present law intact as regards any surplus above that sum. In other words, it secures the workman in the enjoyment of the necessities of life, but does not protect him against the consequences of superfluous luxury. If passed into law, it will at once inaugurate a system of ready-money transactions, and will thereby not only benefit the workman himself, but all those small dealers whose capital does not admit of long credits, but who, under the present system, are forced to give such credits from the competition to which they are subjected. It is to be hoped that all interested in the welfare of masters and workmen will give this bill their cordial support, and that such as are not practically acquainted with the working of the present system will yield to the recommendation of Mr Anderson, whose experience in matters of this kind no one can reasonably dispute.

The Land Tenure Bill.—The Lord Advocate has introduced into the House of Commons, and has read a second time, "A Bill to abolish Feudal and Burgage Tenure, and to amend the Law relating to Laud Rights in Scotland;" but with the exception of the explanation of its provisions by the learned lord, when leave

was given to bring in the bill, no remarks upon, or discussion of its terms, have yet taken place in Parliament. The bill has been published *in extenso* by the leading newspapers in Scotland, and by this time those who take an interest in the measure are doubtless perfectly conversant with the reforms which it proposes to effect. So far as we have been able to gather from public opinion, expressed through the usual channels, the Lord Advocate's first attempt at Law Reform is being received with much favour, not only at the hands of those best qualified to judge of its effect upon the existing state of things, but by those who are deeply interested in its success—the owners of property held under feudal and burgage tenure. The bill is considered to be a wise and statesmanlike measure, well adapted to redress the clamant grievances of the present system, and not a moment too soon of being proposed for the consideration and approval of Parliament. The prevailing feeling, so far as we can ascertain it, is an earnest desire for the speedy passing of the bill, with such amendments as may be thought necessary for the more certain preservation of their feu duties and casualties to those who now possess the character of superiors, and who, after the passing of the bill, will continue to be entitled to demand the same from the owners of the land. There seems to be not the slightest disposition to affect, in the smallest degree, the preferential rights to such duties and casualties that superiors now enjoy; and we have no doubt that any amendments which superiors may suggest for effectually securing these rights—so far as not trenching on the principles of the measure—will meet with favour from the Lord Advocate. His intention and object, as collected from the various clauses of the bill, seem to be this—to sweep away all that is merely formal and restless, and withal vexatious and burdensome to the feuar; but to preserve everything that is truly beneficial to the superior. More sound principles on which to legislate there could not be; and we wish the Lord Advocate every success with his prompt and laudable endeavour to satisfy the demands of the public in regard to this long-wished-for improvement in the laws relating to Land Rights in Scotland. It is said there is a desire in some quarters to delay the passing of the bill; but we think this is to be deprecated. We are far from saying that the bill in its present state is perfect. We think it is capable of improvement; but while we say this, we trust that those who desiderate improvement in the details of the bill will set themselves to work for the attainment of that end, instead of prophesying this and that evil as likely to arise should the bill pass into law precisely in its present form. At another opportunity we may probably make a more critical examination of the terms of the bill, and suggest such amendments as occur to us.

Proceedings against Solicitors.—The *Law Times* says:—"There would appear to be a growing disposition on the part of the public to visit their misfortunes upon the heads of their legal advisers. There are, of course, many temptations to pursue this course, because in addition to obtaining, if the jury be weak enough,

some salve for the soreness of defeat or disappointment, in the shape of a legal victory over lawyers, damages may, to a greater or less extent, flow into the pocket of the plaintiff. Two cases of this nature lie before us, the facts of which will appear at length in their proper place, the one being an ordinary action for negligence, and the other an extraordinary proceeding directed against a solicitor instead of against the proper defendants, who were substantial shipowners. The second case would go to show that to certain minds there is nothing like having a solicitor for a defendant. In both cases the plaintiff failed.

"This is satisfactory; but we have from Ireland the report of a case which gives us the other side of the question. The case is one for which our legal contemporary in that country justly claims a prominent position as a *cause célèbre*, not only regarding capacity for executing a deed, but more particularly concerning professional responsibility. The facts were shortly these: A young man, who from his early years had been given to intemperance, who proposed to a young lady, was refused, and attempted to commit suicide, who then married his father's cook, to whom he became deeply and constantly attached, joined his father in conveying certain estates to trustees for the benefit of his mother and sisters. The promise to convey was made during his minority, and he afterwards agreed to carry out the promise by joining his father in raising a large sum of money. He had been acting without a legal adviser, but at this period it became necessary that he should have one, and a Mr Barlow was appointed. It is with the conduct and punishment of this gentleman that we are now concerned.

"We will first see how the Court describes the offence of which they found him guilty. The Lord Chancellor is reported to have exonerated Mr Barlow from even a suspicion of an imputation upon his moral character and integrity of purpose in the transactions under consideration. But his Lordship added, 'it is quite another question whether, although intending to do no wrong, he has fulfilled his duty in guarding his client by vigilant supervision of and devotion to his interests, and avoidance of meddling with any which would have antagonised them, as to have afforded the care, protection, and independent advice which were requisite to rebut the presumption of undue influence.' This appears to have been the idea existing in the mind of the Lord Justice. Both he and the Lord Chancellor came to the conclusion that Mr Barlow acted in concert with his client's father and mother rather than for the benefit of his client. The Lord Justice expressed himself thus:—'Mr Edward Croker' (the father) 'in one of his letters to Mr Barlow, said—"I would ask you who was to advise John to interfere with my determination to sell Croom estate?" What must Mr Barlow have sunk to in his estimation when he dared to insult him with such a proposal as that? Should not professional duty and honour have prompted him instantly to have repudiated the base proposal? From first to last Mr Barlow was in a position which should have made him dictate whatever terms he thought his client's interest demanded. He was the solicitor of the son, but he acted as coadjutor of the father. A system of not only withholding counsel but suppressing facts from John Croker (Mr Barlow's client)' began on the 5th Nov., 1864, and was persevered in to the end. In four cardinal instances was that fatal error fallen into on the part of a trusted solicitor, and in respect of facts that his client had a right to know. Was that from want of thought? He believed firmly that it was done by design, and in concert with and to subserve the objects of Capt. Edward and Lady Georgina Croker.'

"A very important question arises upon this state of things, an issue upon which we have the misfortune to differ with our clear-headed contemporary the *Irish Law Times*. In a leading article upon the case, that journal characterises the decision as one of 'terrible importance' to solicitors. The solicitor, it writes somewhat melodramatically, 'saw a member of his own profession placed upon the dissecting table, and his every action in matters of the most delicate and confidential character scanned and criticised under the microscopic power of a masterly intellect. Could he help the engagement of his deepest sympathies in such an inquiry?' The sympathies of all professional advisers must have been deeply engaged, but we do not see anything to object to in the microscopic character of

the examination to which the writer refers, because the learned Judges came to broad general conclusions. They disagreed as to the *mens* of John Croker, but they were quite agreed that Mr Barlow had not been that vigilant adviser which the circumstances required that he should have been. Lord Justice Christian went into an elaborate examination of the evidence affecting Mr Barlow, and from the passage we have quoted it appears that he detected a 'system of not only withholding counsel, but of suppressing facts,' that he found that Mr Barlow avoided the challenge of the father—'I would ask you who was to advise John to interfere with my determination to sell Croom estate?'

"But, says our contemporary, Lord Justice Christian was the Judge who found John Croker to be of sound and strong mind, 'and if the client was perfectly capable and intelligent, and, moreover, when he *chose*, could be wilful and obstinate, where is the fault of his professional adviser in allowing him to do this act by which he deliberately cut off the estate from the legitimate offspring of his *misalliance*?' Certainly if the client was in full possession of all the facts, and in full knowledge of his rights, his solicitor could do no more than give him independent advice, and here we find ourselves differing with our contemporary because we view the facts through the eyes of the Court. The writer of that article makes Lord Justice Christian say that Mr Barlow disclosed everything to his client. The report, in another column of his journal, put into the Lord Justice's mouth the words which we have quoted, 'that in four cardinal instances' did the solicitor keep from his client facts which he ought to know.

"We will, therefore, not prolong the discussion which rests upon this disputed question of fact, but will take the main position. Our contemporary would appear to contend that where 'the utmost ingenuity of advocate or Judge has failed to find the shadow of an impure motive' in the conduct of the solicitor 'from beginning to end,' where 'fraud there is none, personal interest there is none,' he ought not in any way to be held liable to his client. Now we conceive that this is a position so untenable, that it requires no argument of ours to demolish it: The second position put forward by the writer is that it is the duty of professional men 'to carry out the intentions of their clients, and not to dictate to them or exhort them to the performance of moral obligations.' This is undoubtedly true where there is nothing in the case to lead the adviser to think that his client is susceptible of undue influence. But it is not denied that John Croker made the rash promise in his nonage, and that he did several things which showed that he stood in the greatest need of a firm counsellor; and, above all, as suggesting a probability of an exercise of undue influence, we have the imperious father who dares his son's adviser to interfere. This father seems to have been a tyrant of the sternest type, and because Mr Barlow succumbed before him our contemporary discovers that 'the fault of the solicitor was not a fault of principle, an ignorance of duty, an error of judgment, but an amiable fault of personal character. He possessed, in fact, the *suaviter in modo*, but not the *fortiter in re*, which was the *desideratum* in the eyes of the Court in this particular transaction.' And the writer adds, 'it should be remembered, however, that the latter virtue would in many other transactions, in which the assistance of a solicitor is needed, be most injurious without the former, and even in this instance it is very doubtful whether a vulgar bullying solicitor, no matter how determined, might not have done more harm than good.'

"We would suggest to our contemporary that there is a decided distinction between an adviser without an 'amiable fault of personal character,' but having plenty of the *fortiter in re*, and the 'vulgar bullying solicitor.' In a case like that of *Croker v. Croker*, an adviser of the son of an imperious father who seeks to benefit himself at the expense of the son's unborn child, is bound to have the *fortiter in re*. It would have been impossible that he could have been too intrusive with facts and arguments to induce the son to consider the course which he proposed to pursue. To allow an 'amiable weakness of personal character' to induce a submission to the imperious dictation of an adverse interest, in our opinion amounts to an offence fairly calling for the condemnation which the Irish Court of Chancery appears to have awarded to it. It is not for us to say which

is the correct version of Mr Barlow's proceedings. We have taken them as stated by the Judges, and we must say we do not see how they could have come to any other conclusion."

The "Albert" Litigations.—There have been two cases before the Courts this week. In one before Vice-Chancellor James—Cook's Policies—it has been held that the claim of a policy-holder could not be effected by the non-payment of a premium after the winding-up petition. The company by their own act had determined the contract, and rendered it absolutely impossible for the policy-holder to perform the condition to pay the premium. The second case was that of the Times Life Assurance and Guarantee Company—also before Vice-Chancellor James—one of the attempts which have been made by policy-holders in amalgamated companies to seek for a winding-up of those companies. The doctrine has again been affirmed that the payment of premiums by policy-holders, the receipt of bonuses by them from the new company and other Acts, constitute an acceptance of the new company as their debtor and a release of the old one. They are, therefore, in a different position from annuitants whose mere receipt of the money due to them from one company has been held not to constitute a release of the company primarily responsible.—*Economist*.

Appointments.—The vacancy on the Bench of the Supreme Court, caused by the lamented death of Lord Barcaple, has been filled up by the appointment of DONALD MACKENZIE, Esq., Advocate (1842), who has held since 1860 the office of Sheriff of Fife. It was generally expected in October last that Mr Mackenzie would then be chosen to succeed Lord Manor, but a foreign influence is supposed, when it was at last resolved to fill up that vacancy, to have obtained the appointment of Lord Gifford instead of Mr Mackenzie. So far as Lord Gifford is concerned, we have already stated our opinion, that no better Judge could have been found. But as events have turned out, it may perhaps be thought that the ostensible reasons for that appointment would have been better attained, if those who are said to have officiously pressed upon the Crown the postponement of able seniors, had allowed things to take the natural course, and if the Home Secretary and the Premier had been wise enough to submit to the guidance of their usual responsible and better informed advisers. In this instance, fortunately, no harm has been done. Both the new Judges are men of undoubted ability, extensive experience, and high character, but we do think that the public service requires that seniority, when other things are nearly equal, shall have some preference. Lord Gifford was, by seven years, Lord Mackenzie's junior at the Bar; he is his senior on the Bench by two months. Some other time it may happen, as it has happened before, that older men will be passed over, till after their prime, and at last, from a tardy sense of justice, or the lack of other fit candidates, be promoted to the Bench when their ability to serve the public has ceased, and the judicial office, instead of offering them repose, only hastens their progress to the grave. We hold that the dispenser of judicial patronage should be able to take a large view of the probable course of promotion for years to come, and that he should be strong enough to resist the temptation to gratify a popular whim, to please a pleasant parasite, or even to disarm a troublesome political rival. When

another vacancy shall unfortunately occur, questions such as we have hinted will hardly, we think, arise; for the candidates on the Whig side for judicial honours will all be ready to yield their claims to the one whom the general voice declares, by his learned labours, to have long ere this earned a right to the place.

STAIR ANDREW AGNEW, Esq., Advocate (1860) has been appointed to the office of Queen's Remembrancer for Scotland, in room of the late John Henderson, Esq., deceased. Mr Agnew has held for some years the office of secretary to Mr Moncreiff, when Lord Advocate, and also to the present Lord Advocate.

ALEX. INGRAM, Esq., Writer and Banker in Stranraer, and J.P. Clerk for Wigtownshire, has been appointed Circuit Clerk of Justiciary, in room of R. L. Stuart, Esq., W.S., resigned.

ALEXANDER C. SELLAR, Esq., Advocate (1862), has been appointed Secretary to the Lord Advocate, in room of Mr Agnew.

WALTER COOK SPENS, Esq., Advocate (1865), has been appointed Sheriff-Substitute at Hamilton, in room of James Veitch, Esq., Advocate (1821), resigned in consequence of bad health. We have a great regard for Mr Spens, and believe that he will make a fair local Judge; but it is beyond a doubt that in making this choice, Mr Glassford Bell has, to say the least, entirely disregarded the preference due, as we have pointed out above, to seniority, and has given point to the objections stated by many witnesses before the Royal Commission to the ordinary run of appointments made from the bar to local judge-ships. If these appointments are to be retained by the Faculty of Advocates, Sheriffs must be careful in their selection of their Sheriff-Substitutes.

ACT OF SEDERUNT ANENT PROBATION AND APPEALS FROM INFERIOR COURTS.

EDINBURGH, *March 10, 1870.*

THE LORDS OF COUNCIL and SESSION, considering that, by the Act of Parliament, 31 and 32 Vict., cap. 100, sec. 106, they are authorised, from time to time, to make such Regulations by Act of Sederunt as shall be necessary for carrying into Effect the Purposes of the said Act, and, so far as may be found expedient, for altering the Course of proceeding therein prescribed, in respect to the Matters to which the said Act relates, or any of them; and considering, further, that it is expedient to alter in some respects the course of proceeding prescribed in said Act, do hereby ENACT and DECLARE—

I. That the 27th Section of the said Act shall be altered to the effect of substituting for the enactments thereof the following Provisions:—

At closing the Record, the Lord Ordinary shall require the Parties to state whether they renounce Probation; and,

(1.) If the parties shall then renounce Probation, the Lord Ordinary shall, in respect thereof, appoint the Cause to be debated in the Debate Roll, and it shall forthwith be enrolled in the said Roll by the Lord Ordinary's Clerk,—without prejudice to the Lord Ordinary or the Inner House ordering

Proof, *ex proprio motu*, at any after stage of the Cause, if they shall deem Proof to be necessary for the purpose of enabling the Court to do complete Justice between the Parties, subject to such conditions as to Expenses as shall seem just.

(2.) If the parties, or any of them, shall not renounce Probation, the Lord Ordinary shall require them to state what Proof they propose; and if Parties are agreed that proof is necessary, and as to what Proof ought to be allowed, the Lord Ordinary, if himself satisfied of the propriety of the Proof proposed, shall appoint the same to be taken.

(3.) If the Parties are at variance as to whether there shall be Proof, or as to what Proof ought to be allowed, or if they or any of them shall maintain that one or more of the Pleas stated on the Record should be disposed of before determining on the matter of Proof, the Lord Ordinary shall appoint the Cause to be enrolled in a Roll to be called the Procedure Roll; and the Cause shall be forthwith enrolled in the said Roll by the Lord Ordinary's Clerk; and, after hearing the parties in the said Roll, the Lord Ordinary shall pronounce such Interlocutor as shall be just; and may either appoint proof to be taken, or dispose of such Pleas on the Record as he thinks ought to be disposed of at that stage. Provided always that it shall be competent to the Lord Ordinary, if he shall think right, to appoint the Cause to be heard in the Debate Roll, in place of the Procedure Roll.

(4.) It shall be always competent for parties having a Cause standing in the Procedure Roll, in regard to which they have come to be agreed, that it should be disposed of by a Proof before the Lord Ordinary, or a Trial by Jury, or otherwise, to enroll the Cause in the Motion Roll in order that the matter may be brought under the consideration of the Lord Ordinary, and such Interlocutor be pronounced as he shall think right in the circumstances.

(5.) In every case in which Proof is to be taken before a Jury, Issues shall be adjusted either at the time of Proof being appointed in the Cause, or on a day to be fixed not later than Eight Days thereafter; and the parties shall lodge the Issues respectively proposed by them Two Days before the day so fixed.

Provided always that it shall be competent to try any Cause by Jury on the Record without Issues, if it shall appear to the Lord Ordinary expedient that such Cause should be so tried.

(6.) The Provisions of the Act of Sederunt of 15th July, 1865, in the first Seven Sections thereof, shall be enforced in Causes in the Procedure Roll, as well as in Causes in the Debate Roll.

II. That the Provisions of the 28th Section of the said Statute shall apply to all the Interlocutors of the Lord Ordinary herein before referred to, so far as these import an Appointment of Proof, or a Refusal or Postponement of the same.

III. That the course of Proceeding prescribed by the 71st Section of the said Statute shall be altered to the following extent and effect:—

(1.) The appellant shall, during Session, within Fourteen Days after the Process has been received by the Clerk of Court, Print and Box the Note of Appeal, Record, Interlocutors, and Proof, if any, unless, within Eight Days after the Process has been received by the Clerk, he shall have obtained an Interlocutor of the Court dispensing with Printing in whole or in part: in which case the appellant shall only Print and Box, as aforesaid, those papers, the Printing whereof has not been dispensed with; and, if Printing

has been in whole dispensed with, shall lodge with the Clerk of Court a Manuscript Copy of the Note of Appeal, furnishing another Copy to the Clerk of the Lord President of the Division: And if the Appellant shall fail, within the said period of Fourteen Days, to Print and Box, or Lodge and Furnish the Papers, required as aforesaid, he shall be held to have Abandoned his Appeal, and shall not be entitled to Insist therein, except upon being Reponed, as hereinafter provided.

(2.) The Appellant shall during Vacation, within Fourteen Days after the Process has been received by the Clerk of Court, deposit with the said Clerk a Print of the Note of Appeal, Record, Interlocutors, and Proof, if any, unless, within Eight Days after the Process has been received by the Clerk, he shall have obtained from the Lord Ordinary officiating on the Bills an Interlocutor dispensing with Printing in whole or in part, for which purpose the assistant-Clerk shall, if required, lay the Process before the Lord Ordinary on the Bills; and in such case the appellant shall Deposit with the Clerk, as aforesaid, a Print of those Papers, the Printing whereof has not been dispensed with; and, if Printing has been in whole dispensed with, shall Lodge with the said Clerk a Manuscript Copy of the Note of appeal; and the Appellant shall, upon the Box-day or Sederunt day next following the Deposit of such Print with the Clerk, Box copies of the same to the Court; or if Printing has been in whole dispensed with, shall Furnish to the Clerk of the Lord President of the Division a Manuscript Copy of the Note of Appeal: And if the Appellant shall fail, within the said period of Fourteen Days, to Deposit with the Clerk of Court, as aforesaid, a Print of the Papers required, or to Lodge with him a Manuscript Copy of the note of Appeal, as the case may be, or to Box or Furnish the same as aforesaid, on the Box-Day or Sederunt-Day next thereafter, he shall be held to have abandoned his Appeal, and shall not be entitled to Insist therein, except upon being Reponed, as hereinafter provided.

(3.) It shall be lawful for the Appellant, within Eight Days after the Appeal has been held to be abandoned as aforesaid, to move the Court during Session, or the Lord Ordinary officiating on the Bills during Vacation, to Repone him to the effect of entitling him to insist in the Appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shown, and upon such Conditions as to Printing, and Payment of Expenses to the Respondent, or otherwise, as to the Court or the Lord Ordinary shall seem just.

(4.) It shall be lawful for the Respondent, within Eight Days after the Appeal has been held to be Abandoned as aforesaid, if during Session, to Print and Box the Note of Appeal, Record Interlocutors, and Proof, if any; and if during Vacation, to Deposit a Print thereof with the Clerk of Court, and thereafter to Insist in the Appeal, as if it had been taken by himself; in which case the Appellant shall also be entitled to Insist in the Appeal.

(5.) On the Expiry of the said period of Eight Days after the Appeal has been held to be Abandoned as aforesaid, if the Appellant shall not have been Reponed, and if the Respondent does not Insist in the Appeal, the Judgment or Judgments complained of shall become Final, and shall be treated in all respects as if no Appeal had been taken against the same; and the Clerk of Court shall forthwith retransmit the Process to the Clerk of the Inferior Court: Provided always, that before retransmitting the Process, the Clerk of Court or his assistant shall Engross upon the Interlocutor-sheet and sign a Certificate in these or similar terms:—“[Date]—Retransmitted in respect

of the Abandonment of the Appeal;" and in respect of said Certificate, the Sheriff, or other Judge of the Inferior Court, shall, upon a Motion being made before him to that effect, grant Decree for Payment to the Respondent in the Appeal of the sum of Three Pounds Three Shillings of Expenses.

IV. The above Regulations shall Receive Effect and be enforced on and after 21st March, 1870.

And the Lords APPOINT this Act to be inserted in the Books of Sederunt, and to be published in the usual manner.

JOHN INGLIS, *I.P.D.*

ACT OF SEDERUNT ANENT FEES FOR PRACTITIONERS BEFORE THE COURT OF SESSION.

EDINBURGH, 18th March, 1870.

THE LORDS OF COUNCIL and SESSION, considering that the Table of Fees for Practitioners before the Court of Session, which, with certain additions and alterations, was enacted and made perpetual by the Act of Sederunt 17th July, 1841, and varied by the Act of Sederunt 7th July, 1858, has, in some respects, become inapplicable or unsuitable, in consequence of changes since introduced into the Forms and Mode of Judicial Procedure, do hereby ENACT and DECLARE that the said Table of Fees, as presently in force, shall henceforth be acted on, with and subject to the following Alterations and Additions:—

There shall be exigible for Time engaged in reference to Judicial Proceedings, where the Practitioner shall take the option of charging by Time:—

In Edinburgh, not exceeding Half-an-hour, 6s. 8d.; above Half-an-hour, and not exceeding an Hour, 10s.; and for each Half-hour, or part of a Half-hour, thereafter, 5s.; but not exceeding for a whole Day of eight hours, £4 4s.

Out of Edinburgh, but in Scotland, the same Rates of Charge as in Edinburgh, besides Travelling and Personal Expenses.

In London, or elsewhere out of Scotland, but in Great Britain, per Day, £5 5s., besides Expenses of Journey, and £2 2s. per Day, in London as Personal Expenses. In addition to time in London, a Day is to be allowed for going, and another for returning.

For Meetings and Attendances for which the present authorised rate of Charge is 6s. 8d. per Hour—not exceeding Half-an-hour, 6s. 8d.; above Half-an-hour, and not exceeding an Hour, 10s.; and for every Half-hour, or part thereof, after the first Hour, 5s.; but not exceeding for a whole Day, £4 4s.

For Letters, in place of the present Charges:—

Each Letter not exceeding One Page of 125 words, 3s. 4d.

Exceeding One Page, but not exceeding Two Pages, 5s.

And for each Page or Part of a Page beyond the first Two Pages, 2s. 6d.

But mere Formal Letters (such as simply transmitting copies of papers), to be charged each 1s.

For Telegrams, the same Rates of Charge as for Letters.

For Drawing Papers not requiring to be drawn by Counsel, and not being Inventories of Productions (instead of the present Charge of 6s. for the

First Sheet, and 4s. for each after Sheet of 260 words), 6s. for each Sheet of 250 words.

For Copies of Papers (instead of the present Charges) per Sheet of 250 words—if in English, 1s. 6d.; if in Latin, 2s. 6d.; ruled and figured, 2s.; or if folio size, 4s.

And the Lords ENACT and DECLARE that this Act of Sederunt shall come into operation on and after the 12th day of May next, and they Appoint the same to be recorded in the Books of Sederunt, and printed and published in the usual manner for the information of all concerned.

JOHN INGLIS, *I.P.D.*

Notes of Cases.

COURT OF SESSION.

FIRST DIVISION.

TRAILL *v.* DANGERFIELD.—*Feb.* 21.

Mortification—Title—Usage—Decennalis et triennalis possessor.—Action at the instance of Traill, of Rattar, against the minister and kirk-session of the parish of Lady, in the island of Sanday, concluding for declarator of immunity from payment of any sum or salary, claimed as payable to the reader or precentor of the kirk and parish of Lady, or to the schoolmaster, claiming such salary as reader or precentor, in respect of the lands of Elsness, acquired by pursuer in a process of judicial sale of the estates of the late John Urquhart Traill of Elsness, conform to decree of sale of Dec., 17, 1840, and crown charter following thereon. The facts appear from the opinions below. The L. O. (parties having renounced probation) found in favour of defrs. In consequence of an equal division in this Division, the case was appointed to be reheard before seven Judges.

Lord Justice-Clerk—Apart from the facts admitted, it was sufficiently established that from a period prior to 1710, the sum in dispute had been regularly paid to the precentor. There could, moreover, be no doubt that the office of precentor, though not essential to the polity of the Church of Scotland, might be the object of a gift. But though, in the case of a public burden, long usage would raise the presumption of a prior act of a competent public authority originating the usage, here the payment was by only one heritor, and must rest on a presumed private grant. There were, therefore, two questions—whether this right ever attached to the lands; and if it did, whether it had been transmitted against pursuer. There was no evidence that it had ever been laid on the lands. A title was necessary, and none was shown to have ever existed. The argument that it was not necessary, the lands being feudal, failed both in point of fact and of law. Again, though the rule *decennalis et triennalis possessor non tenetur docere de titulo* raised a presumption in favour of a title, that operated in favour of ecclesiastics only, not in favour of laymen, even in the case of sums devoted to pious uses. *Burnet v. Gibb*, M. 15,725, referred to in Duncan as a decision to that effect, was imperfectly reported, and indeed was not in its terms applicable to

laymen. As to the second branch of the argument, it was admitted that this was not a real burden. Pursuer, however, bought subject to the burden, and was said to have received a deduction from the price in respect of it. Where the purchaser so bought in the way of private sale, and continued to pay the amount in question for twenty years, the seller's claim for relief was very strong, and the creditor might plead a *jus quesitum*. In the present case, the equity was so similar that it was impossible not to regret that this question should have been raised. But he could not give this effect to a purchase in a ranking and sale. The bankrupt was not the purchaser's author; and the purchaser took the land free from all burdens not appearing on the face of the lands. Though the burden here appeared on the face of the proven rental and other documents in the process of ranking and sale, it was well settled that neither creditors nor purchaser have any concern with such calculations. Mr Bell made this quite plain in a passage which his lordship quoted (Obm. II., 280); on the principle there explained the purchaser in 1840 came under no obligation to pay the annuity.

Lord Ardmillan concurred, with this qualification, that he did not think that, even if the lands had not passed by judicial sale, the claim could have been enforced against singular successors.

Lord Deas—That this was a declarator of immunity from a payment which had been continued for a long time, in which pursuer did not propose that he should be relieved by another party or only as proprietor, but concluded for absolute immunity or extinction of defr.'s right. The question was whether he had proved enough to succeed. This mortification to the kirk-session for payment of a reader or precentor went so far back that its origin could not be traced in any document now extant, though they went back for the greater part of two centuries. It was paid by pursuer's predecessors and by himself since he acquired the lands in 1840, and was only disputed by him after the lapse of that period. Two leading questions arose—(1) Could pursuer's predecessors have succeeded in such an action as this? and (2) Was pursuer now entitled to succeed? As to the former, this was not a question of title to a landed estate. Mortifications did not require a formal written title. Any title might suffice to constitute them, such as a letter engrossed in the records of the kirk-session. The existence of such a title was presumed, and its terms were explained by long possession of the right. In this case there could be no doubt that the terms of the original obligation by the granter, whoever he was, bound himself and his successors in the estate. The proceedings in a Sheriff Court action in 1822 showed that the proprietors of the estate ought to be held bound. In regard to the contention that the proprietor who sold in 1840 was not bound to continue to pay the annuity, he would not go on the ground that the recipient was an ecclesiastic, but proceeded to show, by reference to authorities, that in similar cases the effect of long possession in raising a presumption of an anterior title had not been confined to the case of Churchmen. His Lordship referred to the cases of dry multures (Ersk. II. 9, 28), the constitution of corporations by prescription, fish teinds, etc. The L. J. C. had not differed from his (L. Deas's) view in regard to the obligation of the proprietor who sold in 1840; nor had he held that, if this had been a sale by a private party, the purchaser would have been bound to continue the payment. In regard to the question of judicial sale, he thought there was a fallacy in the L. J. C.'s view. Bell did not lay down

that the purchaser in a judicial sale may shut his eyes to everything. Here he did look at the whole matter, and he was bound by his title to look at this matter. He (L. Deas) pointed out the nature of the purchaser's rights under a judicial sale, which was a slump sale, inferring no warrandice or rights which would not attach to a slump sale; and this was all that Bell meant where he was speaking simply of warrandice. In this case, the matter had been put most plainly before the purchaser. Under this branch the question was, in short, whether this was a public burden or was so dealt with in the sale as to be put on the same footing as a public burden, and so was not struck at by the reduction improbation of all rights not produced which was implied in every ranking and sale. He held that, though the phrase public burden was somewhat vague, it was not a burden paid by everybody, but one paid for public purposes or to a public officer, even if it were paid only by an individual; and he referred to cases to show this. A public burden might originate in usage as well as in statute. This gentleman had paid it for twenty-five years, and was as much bound as his predecessors. It was really a question of relief, and pursuer virtually admitted his own liability by not calling the other party who must be bound if he were free. He (L. Deas) should be sorry if the law of Scotland should sanction as bold an attempt at injustice as he ever saw in a Court of justice.

Lord Benholme concurred with L. Deas, holding that the opposite view deprived long possession of the chief effects that have been attached to it in our law.

Lord Neaves agreed with the L. J. C. and L. Ardmillan, pointing out the necessity of a written title for a burden or rent charge on land, and L. Kinloch agreed with Lords Deas and Benholme.

The Lord President said that the fact that this was a declarator of immunity of lands, that pursuer was a singular successor, and that he acquired at a judicial sale, were the whole elements necessary for the decision of the case. It was not necessary to consider what would have been the result if pursuer himself had paid for forty years, or if he were a descendant of the family who had done so. He was also unwilling to consider the effect of a purchase at a private sale, where the question would have depended on the terms of the disposition—*i.e.*, on whether the right was made a burden on the conveyance. He would also pass over the analogies pressed into his service by L. Deas from servitudes, incorporations, etc. The real question was whether at the judicial sale pursuer took the estate free of all burdens except public burdens. In a judicial sale, public burdens were burdens affecting the lands, or the proprietor as such, and these only. These were good against the purchaser whether mentioned in the memorial and abstract or not. The mention of the payment in question there, in the present case, was not for the information of the purchaser, but of the Court; and the reference in the articles of roup and decree, being for the special purpose of identifying the lands, could not on the ordinary principles of construction be held to import anything about the sum into these documents. The kirk-session might have claimed against the bankrupt, and not having done so, their right was extinguished.

The Court, by a majority of one, altered the judgment of the L. O., and decided in favour of pursuer.

Act.—Sol.-Gen. Clark, Nevay. Agents—Horne, Horne, & Lyell, W.S.—Alt.—Decanus. Agents—Menzies & Coventry, W.S.

PITCAIRN v. PITCAIRN.—Feb. 25.

Will—"Effects"—Titles to Land—Consolidation Act 1868, s. 20.—Action by John Pitcairn, as general disponee of David Pitcairn of Kinnaird, against his brother, Hope Pitcairn, as heir of line and conquest to David, and as heir of provision under the settlement of his father, John Pitcairn. The conclusions were that Hope Pitcairn should be decerned to enter as heir in one or the other character, and convey to his younger brother, the pursuer, and failing his doing so, for declarator that a certain holograph testament of David was an effectual conveyance, John, and for adjudication in implement of the heritable estate. The father of the parties made a settlement in 1854, whereby he conveyed his heritable estate to his eldest son David, and the heirs of his body, whom failing to Hope Pitcairn, his second son, and the heirs of his body, whom failing to John Pitcairn, and the heirs of his body, whom failing to his own nearest heirs whomsoever. The father, died in 1857, and David made up titles and possessed the lands till his death, without issue, in 1869. He left a holograph will, and the question was whether that affected the heritable estate, or left it to go to Hope Pitcairn, under the destination in the father's settlement. Pursuer relied on s. 20 of the Titles Consolidation Act of 1868. The L. O. (Mure) found that David's will was not valid to convey the heritage, or to impose on defr. an obligation to make up titles and convey to pursuer, and assolizied. Pursuer reclaimed.

The Lord President said that pursuer might possibly have prevailed if the statutes had said that every will should be held to settle the testator's heritable as well as his movable estate; but the object of the statute was merely to dispense with certain technical words. It only makes a deed which has not the word "dispone" a good *mortis causa* conveyance of the lands in respect to which the words are used, and words of bequest are made good only where used "with reference to such lands." It, requires in its second branch, in prescribing what is necessary to make an effectual bequest of lands—(1) the use of words which would be good to bequeath movables; and (2) that they shall be used *with reference* to the lands. It was plain, that the Act did not dispense with the maker specifying what he intends to give, and to whom. Thus the question came to be whether the testator saying that all his effects should go to John Pitcairn could be held to convey his heritage. The word "effects" had a particular application to movables and estate, especially, though not exclusively, to corporeal movables, and certainly it was never held to embrace any kind of heritage. No Scotchman of average education would use it in such a meaning. Even taking into view the various considerations appearing from the context, and the circumstances of the parties, which were alleged to give the word a different meaning in the present case, his Lordship came to the conclusion that David Pitcairn did not mean to convey the heritable estate to John.

Lord Deas concurred as to the construction of the statute and the meaning of the word "effects" as inapplicable to heritage. His Lordship held it dangerous to go into any construction of such a word as "effects" by reference to the supposed intention of the parties. If, however, such construction were admissible, he would concur with the Lord President in holding that David had not intended to convey the heritable estate by his holograph will in question.

Lords Ardmillan and Kinloch concurred.

Act.—Sol.-Gen. Clark, Asher. Agents—M'Ewen & Carment, W.S.—All-Decanus, J. Marshall. Agents—Hill, Reid, & Drummond, W.S.

SPECIAL CASE—BORTHWICK, &C.—*March 2.*

Husband and Wife—Pursuer—Terce—Election.—This case was presented in order to determine whether the executors of the late Mrs Pringle, of Torwoodlee, were entitled to claim the terce of the heritable subjects in which Admiral Pringle died infest, in 1859, leaving children. There was no contract of marriage; but he left:—1st, An heritable bond of annuity in favour of his wife, providing to her an annuity of £520, including pension from the Admiralty; 2d, A trust-disposition and settlement, directing £1000 to be paid to the widow, for furniture and mournings, and as an interim alimentary allowance. Mrs Pringle did not accept of these provisions, nor did she claim her legal rights. She received only the pension paid by the Admiralty. The trustees, however, consigned the amount of these provisions in the bank as they became due. The trustees, who were bound to execute a deed of entail of the estate in favour of the truster's son, were prevented from carrying out the truster's intentions by the delay of Mrs Pringle to elect, and raised a multipleponding. Mrs Pringle did not appear, or claim in this action. The trustees, after having executed a deed of entail, burdening the estate with the annuity to Mrs Pringle, or alternatively with her terce, obtained exoneration. Mrs Pringle, down to her death in 1869, never made her election between the provisions and her legal rights.

Held, that it was not necessary to decide the general question, which was difficult, whether the right to terce was transmitted to a widow's representatives. The circumstances were sufficient to enable the Court to repel the claim of the widow's representatives. Mrs Pringle had been silent for ten years. She allowed her provisions to be consigned. She allowed the estate to be judicially adjudged to the heir. Even if she were alive, it was very doubtful whether she could now challenge what had been done in the action of multipleponding. It could not be said that she required the terce for the maintenance, because she had lived on her pension without it. The claim to terce was alimentary. *Held*, that the claim of the widow's representatives could not be sustained.

AP.—WISEMAN AND OTHERS.—*March 5.*

Sequestration—Election of Trustee.—The estate of John Cumming, photographer, 1 Hanover Street, was sequestered, and his creditors were appointed to meet on 21st January to elect a trustee. At that meeting the apparent majority of creditors supported John Wiseman, and the apparent minority voted for Thomas Dall. Each side declared its own candidate duly elected, and protested against the validity of the votes tendered for the opponent. A cautioner was proposed by Wiseman. No cautioner was proposed for Dall. The first objection was stated by the creditors supporting Dall, and had reference to the vote of Gilbert Cumming, a brother of the bankrupt, and, if sustained, would give these creditors a majority. This vote was upon a claim for a sum of £817 7s, and was stated in the usual form of a tradesman's account, and was supported by an affidavit. One of the items of this claim was £382 as wages due to the claimant for "services."

The S. S. (Hillard) sustained the title and interest of William Forbes Skene and others to appear and insist in their objections to the confirmation of John Wiseman as trustee; found that Wiseman was not supported by a majority of valid votes, and declined to confirm him as trustee; and in respect that Thomas Dall was not a party to the present proceedings, appointed the creditors to meet of new, for the purpose of electing a trustee.

John Wiseman and two of the creditors appealed against this judgment.

To-day the Court dismissed the appeal. They held that when a party was appointed trustee, and did not choose to enter into a competition with the creditors who opposed his election, the creditors who supported him were quite entitled to oppose the election of another, and to endeavour to get the Sheriff to elect their own nominee. It ought not to be assumed that professional men who were nominated were to litigate. The statute rather pointed out the creditors as the proper parties to enter upon the scrutiny of votes. The title of the creditors who supported Mr Dall was undoubted, but no cautioner had been proposed for him, and no opportunity had been given for the creditors to declare their satisfaction with the cautioner as required by the statute. On the other hand, the creditors who supported Mr Dall had succeeded in placing his opponent in a minority. This depended upon the vote of Gilbert Cumming, which was vested on his claim, stated in the form of a tradesman's account. It would be out of the question, in the general case, to have refused a tradesmen's claim stated in the usual form of an account. But this principle could not be extended to classes of claims which were not usually stated in that form. A mere collection of claims did not constitute such an account. In considering the *bona fide* character of the claim, it could not be kept out of view that the claimant was the brother of the bankrupt; and that the bankrupt in 1868 executed a trust-deed for behoof of creditors whose names were therein set out, but the name of Gilbert Cumming did not appear in that list. It was not necessary to consider the other claims for the rejection—this claim placed the appellant in a minority. The only course the S. S. could follow, having Wiseman in a minority, and Dall in a majority, but without having found caution, or having giving the creditors an opportunity of judging of his caution, was to appoint another meeting for the election of a trustee.

MACKENZIE v. MUNRO.—March 8.

Landlord and Tenant—Obligation to uphold houses.—Action at the instance of Mackenzie of Findon, against tenant of Woodlands. Defr. was tenant of the farm, under a lease granted by the author of the pursuer for nineteen years from Whitsunday 1848. Under this lease, the proprietor was bound to put "the houses, offices, and fences in good tenantable condition and repair forthwith;" and on their being so delivered, the tenant was bound to uphold them and leave them at the expiry of the lease in that state. Captain Mackenzie alleged that the tenant had not maintained the houses, etc., in proper repair during the lease, and had not left them so at the end of it, and he claimed £500 as damages. The defender maintained that the houses, etc., had not been delivered over to him in good repair at the beginning of his lease, and that he was not liable to maintain them or leave them at the end of the lease in that condition.

After a proof, the L. O. (Ormidale) found that the proprietor had not implemented his part of the obligation, and that the defender was not liable, under the present action as laid, in reparation and damages, and assolizied the defender. In a note to his interlocutor, the L. O. stated his view to be that the obligation of the proprietor must be performed in its entirety before liability could arise on the part of the tenant.

The Court substantially adhered. They held that it was proved that, when the tenant entered upon the lease, the houses were so decayed as to be incapable of being repaired, and that it was the duty of the landlord to

have informed the tenant if he thought that he was not implementing the obligation during the currency of the lease, and not to wait till the end of it and then claim damages. They repudiated the principle of the L. O. that it required performance in its entirety on the one side before any liability could arise on the other.

CRAWFORD *v.* THE MAGISTRATES OF PAISLEY (CROSS STEEPLE).—*March 10.*

Interdict—Expenses.—Interdict by John Crawford against the magistrates taking down the Cross steeple of Paisley, or at least from proceeding to do so until it should be judicially ascertained that the steeple could not be repaired or made permanently secure, and that it was absolutely necessary for the safety of life and property that it should be taken down. After a proof and other procedure, the L. O. (Barcaple) found it proved that when the Magistrates and Town Council resolved to take down the Cross steeple, that was a measure necessary for the safety of life and property, owing to the state of the building and nature of the soil on which it was founded, and found Crawford liable in expenses. Mr Crawford reclaimed.

The Lord President said—It is much to be regretted that the expenses in this case are so formidable. But we are now to consider who is most to blame for these expenses. The first question is, whether Mr Crawford was justified in coming into Court with the application for interdict. The magistrates were anxious to widen the High Street of Paisley, and in order to do so it became known that they intended to take down the steeple. There can be no doubt that the widening of the High Street was the main object. It afterwards was discovered that the Cross steeple was insecure, but the magistrates announced their intention of taking down the steeple in order to widen the street. The steeple was the property of the Town Council, but it could not be sold, nor could it be pulled down, without judicial authority, unless there was an immediate risk to the inhabitants. If the magistrates possessed the authority which in a royal burgh was exercised by the Procurator-Fiscal, they were bound to exercise it in a judicial manner. They cannot do it spontaneously, but only on an application made to them by one party, and thus give the other party an opportunity to appear and oppose. Nothing of this kind was done in this case. I cannot doubt that the magistrates might competently have applied to the Sheriff for authority. But they did not do so. On the contrary, having led the community to believe that safety was not their object, but that it was the widening of the street that they were engaged in, they proceeded to take steps for taking down the steeple. In these circumstances, Mr Crawford came into Court, and not only asks interdict against demolition, but also has an alternative prayer, and, as very often happens, the alternative may be what he really desired, for interdict against taking down the steeple until it had been ascertained that the steeple was incapable of being repaired. The respondents having proceeded without judicial authority, the object of the application was to compel them to obtain that authority. I think that was reasonable, and that the respondents would have been well advised if they had at once consented to a remit to a man of skill. They owe it to themselves that they did not take this remit in July last, when the whole case might have been brought to a close. The respondents having thus gone wrong in not consenting to the course proposed, I am of opinion that the expenses in the Bill Chamber should be given to the suspender. Since the Lord Ordinary's interlocutor, I cannot say that either party has behaved

in a proper way, and I am of opinion that neither party ought to have expenses. Since the date of the interlocutor reclaimed against, I am of opinion that the reclamer is entitled to his expenses, as he has obtained a material alteration in the matter of expenses.

Lord Deas—In the question of expenses, it is an important consideration whether the complainer was justified in coming into Court. I think he was. While the magistrates in their proceedings may have been acting in good faith, I don't think they acted regularly or judicially. The steeple was inalienable, and could not be taken down without necessity. If it was necessary to take it down, they might have applied to the Sheriff. In burghs where there is no Dean of Guild, the magistrates come in his place; but then they must not act otherwise than judicially. This steeple being the property of the magistrates, in which the inhabitants had an interest, the simple course was to apply to the Sheriff. They proceeded, however, to resolve to take down the steeple for effecting a particular object—viz, the widening of the High Street—and in such circumstances the suspender was perfectly justified in coming here and asking for interdict. But in the question of expenses we must look to the proceedings of the magistrates. It is plain that the immediate cause of mischief to the steeple was the making of a drain within a few feet of the foundation, by Beatson, the servant of the magistrates, and who had power from them to do so. The magistrates, therefore, made this drain, which caused the whole danger which afterwards occurred. If Beatson had thought for ten minutes, he would have seen that the making of that drain was attended with danger. I therefore concur with your Lordship that the suspender was entitled to come into Court and ask for interdict until it was judicially ascertained that the steeple was in a state of danger. The respondents at first do not ask for a remit to an architect. They do so afterwards; and when the danger is ascertained, and the steeple is to be taken down, they go on with an expensive proof, and drag the complainer into it. I think the complainer should get the expenses suggested by your Lordship.

The other Judges concurred, and found the magistrates liable to the complainer in the whole expenses incurred in the Bill Chamber, and also to the whole expenses since the date of the Lord Ordinary's interlocutor.

ANDERSON OR FLAUN v. ANDERSON'S TRUSTEES.—March 11.

Husband and Wife—Title to Sue.—Action at the instance of Mrs Anderson or Flaun, spouse of Thomas Flaun, shipmaster, Aberdeen, and her husband, against the trustees of her mother, the late Mrs Anderson, North-West Street, Aberdeen, in order to recover her *legitim* and her share of dead's part, as daughter of the deceased Charles Anderson, husband of the late Mrs Anderson. Defrs. pleaded that Thomas Flaun had no title to sue, in respect that he was not the lawful spouse of Mrs Flaun, and that Mrs Flaun had no title to sue without the concurrence of George Skinner, who they alleged was her lawful husband. The female pursuer denied at first that Skinner was alive, but this was cleared up in November last by Skinner's appearance in Aberdeen. Thereafter the dependence of the action was intimated to him, but, instead of appearing therein, he disappeared altogether. Defrs. moved the L. O. to have the action dismissed with expenses, in respect that Thomas Flaun had no right or title to insist on the action, and that Skinner, the husband of the female pursuer, had not appeared. The female pursuer made the counter-motion to have a *curator ad litem*

appointed to her. But the L. O. (Mure) refused the motion, and sustained the plea of defrs. against the female pursuer's title to sue, and dismissed with expenses.

The female pursuer, who now called herself Mrs Anderson or Skinner, reclaimed.

The Court recalled the L. O.'s judgment. They held that, if pursuer's claim was well founded, it could not be got rid of because the husband refused his concurrence to the action. The only question was how the instance could be made good. It was a question whether a *curator ad litem* should be appointed for the present action, and whether that would constitute a good title to sue. It was not necessary to go into that, as the lady had stated that she was deserted by her husband, and, if that was true, she had a remedy under the first section of the Conjugal Rights Act, which would remove the difficulty, and she had stated her willingness to avail herself of it. She might then obtain an order for protection, which would enable her to sue in her own name. The Court superseded consideration of the cause till the third sederunt day in the summer session, in order to give the female pursuer an opportunity of obtaining an order for protection, and reserved the question of expenses.

AP.—M'CALL v. MUIR.—*March 11.*

Reparation.—Robert M'Call, coach-builder in Dumfries, raised this action in the Sheriff Court of Wigtown and Kirkcudbright against John Muir, innkeeper, Dalbeattie, concluding for £300 as damages in consequence of his having been thrown out of a dog-cart, hired from defr. on Dec. 15, 1866, to carry him from Dalbeattie to Auchencairn and back, and also for £1 10s, being the amount of a doctor's bill paid by the pursuer.

The S. S. (Dunbar) found that the driver of the dog-cart was a person of fifty-six years of age, and of forty years' experience in driving, and regarded by his master as a cautious and steady as well as an experienced driver, and that the dog-cart was drawn by a quiet steady horse that had been in the defr.'s possession for some years; that pursuer and the driver were both sober, and proceeded on their journey at a moderate pace of seven or eight miles an hour till they reached Thornglass, when they were met by a cart loaded with tiles under the charge of a young man; that, in passing, the two vehicles came into collision, and, in consequence, the pursuer was thrown violently out of the dog-cart, and sustained a fracture of the left elbow joint, which required surgical care and attendance for three weeks, and occasioned permanent injury and disability for work in that arm, as well as serious pecuniary loss and damage in the pursuer's business; that, when the collision occurred, the dog-cart was on the proper side of the road, and the driver of the cart was at his horse's head, and leading him; that immediately after the collision the pursuer represented it as accidental; that for four months and a-half he never made any complaint to the defender against the driver, nor intimated any claim for damages on account of the collision, and found that it had not been proved that the accident was the fault of defr.'s driver, and therefore assolizied him. Upon appeal, the Sheriff (Hector) adhered.

The pursuer having died, the action was maintained by his brother, who appealed. The Court adhered. *Held*, that the proof failed to establish negligence on the part of the driver. If the proof had established that there had been greater negligence on the part of the driver of the dog-cart than on the part of the driver of the cart, it would be a difficult question

whether the master of the driver of the dog-cart would be liable. It was a question whether the hirer was to be responsible for every fault of his servant. But the present case was one of accident, and no one was proved to be to blame.

GORDON'S TRUSTEES AND ANOTHER v. SCORGIE.—March 12.

Landlord and Tenant—Process—Interdict.—Suspension and interdict at the instance of the trustees of the late Sir Alex. Gordon and James Alex. West Loredon, as proprietors of the lands of Auchnacant, in Aberdeenshire, against their tenant Alex. Scorgie, farmer, Brunthill. Finding the farmhouse too small for the accommodation of his family, the tenant erected, at his own expense, a small kitchen communicating with the farmhouse. After it had been erected it was found to be uninhabitable, owing to the rain coming in through the roof and walls. The tenant then removed to lodgings at Newburgh. He also determined to pull down the kitchen, and entered into a contract with a builder to erect a more suitable structure in its place. The proprietors at this stage, without any intimation to the tenant, lodged a note of suspension and interdict in the Sheriff Court of Aberdeenshire, praying that the tenant should be interdicted from pulling down the building he had previously erected. The S. S. (Thomson) refused this note, and the Sheriff adhered. The proprietors appealed. The Court adhered. They held that the proprietors were not justified in applying for interdict until they had made some communication with the tenant, and found what he was really intending to do. If they had visited the tenant or written to him, the whole matter might have been put right. The tenant had made a complete answer by showing that what he intended to do would benefit the landlords.

SPECIAL CASE—MACLAREN BROWN AND OTHERS.—March 15.

Entail—Trust.—This case was presented to the Court in order to settle the rights of the beneficiaries under the trust disposition of the late John Brown, Esq., of Marlee. Mr Brown died in 1858, and left a considerable amount of property, heritable and movable, and also a considerable amount of debt. Mr Soutar, writer, Blairgowrie, who was nominated trustee in Mr Brown's settlement, sold some of the heritable properties, and from the proceeds, along with the movable property, paid all the trustee's debts. The whole movable funds and property were thus exhausted; but Mr Soutar held as trustee the estates of Marlee and Balcairn, in Perthshire, and the Theatre-Royal in Edinburgh, and some heritable property valued at £2000. The trust-deed directed that, after payment of his debts, the balance of funds should be employed in the purchase of lands in the county of Perth, and as near as might be to the properties belonging to the trustee. The trustee was taken bound to execute a deed of strict entail of the whole properties in favour of Allan Maclaren Brown and the heirs-male of his body, whom failing the heirs-female, whom failing to the sister of Allan Maclaren Brown and her heirs.

The Court held that the Theatre-Royal must be included in the deed of entail in favour of Mr Maclaren Brown and the series of heirs indicated in the trust-disposition and settlement of John Brown. A theatre was not a subject that seemed a natural one to entail, but it was not incompetent to do so, and the question was whether Mr Brown really intended that it should be entailed. This intention could only be ascertained from the

settlement of Mr Brown, which he made for himself without the assistance of any other professional man, but then it could not be forgotten that he was a solicitor himself. The theatre was acquired shortly before his death, and the disposition to him was executed only two months before. He, however, had allowed his settlement to remain unchanged for all that time. It must be, therefore, he held, to have been his intention that the Theatre-Royal should be entailed along with his other heritable property. The theatre, when it came into Mr Soutar's hands, was insured for £5000, and Mr Soutar increased the insurance to £15,000. The theatre was burned down in 1865, and Mr Soutar obtained the amount of insurance and added £2000 and rebuilt the theatre. The Court held that the premiums formed a proper charge against the income of the trust-estate, and that, as Mr Maclaren Brown had been consulted and had not objected at the time to the additional sum of £2000 of trust-funds being expended in the erection of a new theatre, he could not now demand that that sum should be repaid.

BOWES' TRUSTEES.—*March 18.*

Trust—Vesting.—This special case was presented in order to settle a question which arose under the trust-disposition and settlement of James Bowes, who died Jan. 22, 1840, survived by his widow and eleven children. By that deed, he directed his trustees to pay the free income of the residue to his widow, until his youngest child, alive at the time, should attain majority. So soon as that event happened, he directed his trustees to sell his whole means and estate, and, after payment of his debts, and after investing a sufficient sum to provide an annuity to his widow, the residue to be divided among his children. The deed contained the following condition: That the shares or provisions to his sons of the residue should become vested interests on their attaining twenty-one years complete; and the shares to his daughters on their being married or attaining twenty-one years complete, whichever should first happen, and should become payable to him, her, or them respectively at the first term of Whits. or Marts. that should happen after his youngest child alive at the time should have attained the age of twenty-one years complete. One of the daughters, Isabella, married James Cleghorn, merchant, Edinburgh. She died in 1844, before the youngest child had attained majority. After her death, her husband, before the youngest child had attained majority, assigned her right under her father's settlement, and the trustees of the late John Bowes are now in right of that assignation, and claimed the share of Mrs Cleghorn as having vested at the marriage. Mrs Waddell, the only child of Mrs Cleghorn, also claimed this share, on the footing that the share did not vest until the youngest child of the truster attained majority.

Held, that the share had vested in Mrs Cleghorn at the date of her marriage, and that James Bowes' trustees were bound to pay over her share, which amounted to £350, to the trustees of the late John Bowes, banker, Dalkeith, who were now in right to the assignation by the late Mr Cleghorn. The clause in the deed was quite distinct as to vesting taking place at the marriage of the daughter, and that, though there were other clauses in the deed which might be held to cast doubt upon that clause, yet that they were so indistinct as to be ambiguous, and could not control the clause as to vesting.

CITY OF GLASGOW UNION RY. Co. v. M'EWEN & Co.

Railway—Compensation—Landlord and Tenant.—M'Ewen & Co., tobacco manufacturers, Glasgow, were tenants of certain property which the railway company sought to acquire under their Act of Parliament. On 22d Oct., 1868, the suspenders gave notice to Stewart & Co., the proprietors, that they were to take for their railway the property, of part of which respts. alleged that they were tenants, under a three years' lease from Whits., 1868. In Oct., when susps. gave him notice, no written lease was in existence. It appeared that in the end of 1867 certain communications took place as to a renewal of the lease for three years. On 4th Feb., the lease, which was now founded on, was made out, and the question was whether respts. were to be dealt with as validly vested with a tenancy for three years, or whether susps. had acquired the subjects by their statutory notice free from any lease after Whitsunday, 1869.

After a proof, the L. O. (Neaves) granted the interdict craved against respts. proceeding to make good their claim against the railway company.

Respts. reclaimed. The Court adhered. *Held*, that there was no valid lease. It would not do to allow the tenant and the landlord to combine and raise up a claim after notice had been given by the railway company. Even if the proprietors were under a moral obligation to grant a lease of the property, they could not be allowed to raise up a claim against a third party. It was quite clear that the railway company was not bound to compensate the tenants.

MERCER, &c. v. ANSTRUTHER, &c.—March 19.

Proof—Examination of Parties—Commission.—In this case a commission had been granted to examine Mr Mercer in the Mauritius on condition that Mrs Mercer should return and be examined in this country. A proposal was now made on behalf of the pursuers that the Court should grant a commission to examine both Mr and Mrs Mercer. The Court granted the commission, but reserved the question of the competency of using the report of the commission, to be decided at the trial. The right of parties to be examined in their own cases was one which did not belong to them at common law, but was only conferred by a recent statute, and the Court had never hitherto allowed such an examination except before the Court, when they were subject to cross-examination. A very special case had been made out by the pursuers, and the Court were satisfied that it would not be safe to insist on Mrs Mercer, who was in a delicate state of health, coming home. The Court, however, indicated an opinion that the pursuers must take the risk of any change of circumstances rendering the evidence incompetent, and also the risk of the depositions showing that more information was required.

BEVERIDGES v. COLLINS AND OTHERS.—March 19.

Suspension—Caution—Forgery.—Suspensions of charges on bills, on the averment that they were forgeries. Complrs. sought they should be suspended without caution, on the ground that they were *prima facie* forgeries, and that there were so many forged bills that if complrs. were ordained to find caution they would be unable to do so, and would be thereby barred from trying the question whether the bills were forgeries or no. Respts. replied that the bills were not *prima facie* forgeries; that the proper time for considering the alleged hardship of ordering caution was when complrs. were

charged to make payment of sums for which they were unable to provide; that there was no evidence that complrs. were unable to provide caution for all the bills alleged to be forgeries, and that they had adopted the bills.

The L. O. on the Bills (Gifford) ordained complrs. to find caution, holding that there was no *prima facie* case of forgery, and that it would require a very clear case to enable the Court to dispense with caution. The Court adhered, the Lord President remarking that there was no reported case in which caution had been dispensed with on the allegation of forgery.

LANG v. HALLY.—*March 20.*

Bankruptcy—Removal of Trustee.—Petition and complaint at the instance of Robert Lang, praying for the removal of George Hally from the office of trustee on the sequestrated estate of petr.'s father. This estate was sequestrated in 1858, and in 1861 Hally was appointed trustee. The petition was rested on the allegations—1. That the trustee was an undischarged bankrupt; 2. That the caution found by him was inadequate; 3. That he had failed for years to comply with the requirements of the bankruptcy statute in regard to reports to the accountant in bankruptcy and annual returns; 4. That he was a mere tool in the hands of his employer, Mr Charles Reddie, who was his cautioner as well as a commissioner and law agent in the sequestration; 5. That there was danger to the estate; and 6. That he had mismanaged the estate. The Court remitted to the accountant of Court, who stated, *inter alia*—Looking to the confidentiality between respt. and Mr Reddie, to the fact of the former having been an undischarged bankrupt, and also to the fact of the proceedings at the instance of petr., the accountant considered that it was a case which ought to be reported by him to the Court.

The Court, while they did not decide whether petr. had any right to appear, as he was not a creditor in the sequestration, gave decree for removal of the trustee from his office. They held that they were quite entitled to do so on the report of the accountant in bankruptcy, and that it was clear that the trustee had not complied with the bankruptcy statutes. They also appointed the creditors to meet and elect a new trustee.

SECOND DIVISION.

APPEAL—MILNE v. FORBES.—*Feb. 22.*

Sheriff—Process—Revival of Action—Decree by default.—In this case, the S. S. (Comrie Thomson), at a diet fixed for proof, decerned for pursuer on the ground that defr.'s agent stated that he did not know where his client was, and had not been instructed to proceed with the proof. Defr. appealed. The Court recalled, and gave pursuer the expenses of bringing her witnesses to the proof. *Held* that the Sheriff was not entitled to give decree without hearing the evidence, or at least that he ought to have ordered intimation to defr. before doing so. Their Lordships indicated an opinion that a Sheriff was bound to consider the reasons for delay even when the parties consented to revive the action, under s. 15 of the Act of 1853. The judgment in the case of Mackintosh, 10th November, 1863, was not an authority against this view of the Sheriff's duty.

Act.—Rhind. Agent—W. Officer.—Alt.—Melville. Agent—J. Barclay, S.S.C.

STOOLE v. MACLEISH.—Feb. 25.

Appeal in an action of breach of promise of marriage. There was no dispute that the parties had been engaged, but the question came to be whether defr. had so behaved as to imply a breach of the engagement. Pursuer maintained, founded on repeated postponement of the marriage and other conduct on the part of defr., which she alleged was the result of a determination on his part to force her to give up the match. Defr. alleged that he had always been, and still was, honestly willing to marry pursuer, and that the marriage had been broken off by pursuer and her friends, on account of defender's temper and habits.

The S. S. (Guthrie Smith), and on appeal the Sheriff (Heriot), assoilzied, holding that defr.'s conduct, while it amply justified pursuer in breaking off the match, was yet consistent with a *bona fide* willingness on his part to marry pursuer. The Court adhered; but in respect that defr. had throughout behaved badly, and might fairly be held to have led pursuer to believe that he wished to break off the marriage, thought that no expenses should be allowed in either Court.

Act.—Strachan. Agent—D. Milne, S.S.C.—Alt.—Asher. Agents—Mar-lachlan & Rodger, W.S.

CALDER v. ADAM.—March 2.

Road—Possession—Judgment.—Appeal from Elgin in a petition for interdict, presented by appt., farmer, Muirtown, against respt., farmer, Kinnedar. The question related to respt.'s right to use a road passing through petr.'s farm, and connecting two high roads near Elgin, one known as the Muirtown Road, and the other being the old turnpike road between Elgin and Lossiemouth. Petr. maintained that the road was a private road. Respt. alleged that it was public, and had been used by the public from time immemorial, or at least for the last seven years and upwards. The S. S. found that petitioner had failed to prove that the road was private, and that, on the contrary, for many years past, and at all events for more than seven years, the road had been used by any person choosing to do so. He accordingly dismissed the petition, holding respt. entitled to a possessory judgment. Petr. appealed, and contended that respt. was not entitled to a possessory judgment—(1) because he had not relevantly averred any title, inasmuch as his averment of immemorial use was qualified by the weaker alternative of seven years' use; (2) because it was in any view established by petr.'s evidence that the road was not in existence forty years back, and could not have been possessed by the public as a matter of right during the last seven years.

The Court adhered to the S. S.'s interlocutor, holding that the only title necessary to found a possessory judgment in a question of public road was the character of a member of the public; that here that title was well averred and also proved, and that it was also proved that the requisite seven years' possession had been had. With regard to petr.'s contention that the road was private, and the possession during the seven years the result of tolerance, it was enough that the evidence did not support that contention, but, on the contrary, pointed the other way.

WRIGHT'S TRUSTEES AND MISSES WRIGHT, &c.—March 15.

Deposit—Receipt—Donation—Expenses.—The parties to this special case were the testamentary trustees of the late John Wright, sometime merchant

in Naples, thereafter of Largs Castle, Ayrshire, and Mr Wright's three sisters, Miss Margaret Wright, Miss Mary Wright, and Mrs Howie. There were two questions. The one was whether, under a certain clause in Mr Wright's trust-settlement, certain subjects at Seamill, Ayrshire, went to Mrs Howie and Miss Mary Wright in whole or only in part. The Court, on the construction of the clause, decided that the whole of the subjects in question went to these ladies. The other question had reference to a claim made by Miss Margaret Wright for £500, alleged to have been gifted to her by her brother under the following circumstances:—Mr Wright for some years before his death had been in declining health, and had received constant attendance from his sister Margaret. As some recompense for this, he stated to her that he intended to make her a present, and accordingly, in November, 1864, he deposited £500 with the City of Glasgow Bank at Largs in her name, and informed her of his having done so, and the deposit-receipt was sent to her by the banker. In August following, however, he obtained back the deposit-receipt endorsed by Margaret, and obtained the proceeds, and so matters stood at the time of his death. The Court held that, however the case might have stood if the deposit-receipt had remained in Margaret's possession, the taking of it back by Mr Wright, in the circumstances stated, must be taken as evidence that there had been no complete *animus donandi* on his part, and that therefore the trustees would not be justified in paying the amount to the alleged donee, whatever might be their own belief as to the testator's intention.

With regard to expenses, their Lordships found Miss Mary Wright and Mrs Howie entitled to expenses so far as applicable to the first question, but, with regard to the question of the alleged donation, they allowed no expenses against either party. It was observed that the rule as to expenses in special cases was not different from that applied in ordinary actions, and that, while expenses would in general be allowed out of a trust-estate when the questions at issue arose from ambiguities in the testator's settlement, it must not be supposed that every claim made against trustees which had reasonable grounds, and was proper to be tried, was to be dealt with, as regards expenses, otherwise than in the ordinary way, merely because the suit was amicable and took the form of a special case.

CAMPBELL v. CAMPBELL.—*March 15.*

Husband and wife—Separation—Aliment.—Action at the instance of a wife for aliment against her husband, on the ground that he had deserted her for upwards of twelve months, and had also treated her with cruelty, although the cruelty was not of a nature *per se* to warrant judicial separation. In his defences, the husband, while he denied the desertion and cruelty, judicially offered to receive the pursuer into his house, and to maintain her as his wife. He pleaded that, in respect of this offer, the action should be dismissed, and also that the action was incompetent in respect there was no conclusion for judicial separation.

Pursuer maintained that the action was competent on the ground of desertion, and that the offer to receive her to his house, which was made for the first time in the defences, was not a genuine *bonâ fide* offer, but a device resorted to by the defr. to throw out the action, and to get quit of an inhibition, raised on the dependence. The L. O. (Jerviswoode), after hearing parties on the relevancy, allowed a proof before answer, and

decerned against defr. for payment to the pursuer of a sum towards the expenses of process.

Defr. reclaimed against this interlocutor, and the cause was heard in December last, when the Court refused to hold the action incompetent, but, in respect of the offer made by defr., superseded farther consideration of the cause to allow the pursuer to test the sincerity of defr.'s offer by returning to his house. Defr. again moved for absolvitor, on the ground that the parties were now living together as husband and wife; but this motion being opposed by the pursuer, and it being stated to the Court that, though pursuer had returned to defr.'s house, he still continued his cruel treatment, they refused to grant absolvitor, and superseded further consideration of the cause.

SUTHERLAND'S TRUSTEES v. SUTHERLAND.—March 16.

Trust—Legacy.—Multiplepinding for determining the rights of claimants to the residue of the estate. The competition was between the trustees next of kin and the representatives of his deceased brother James. George Sutherland Sinclair, the father of the trustee, who died in 1840, was proprietor of Brebster and West Cansbay, in Caithness-shire. By trust-disposition and settlement, in 1832, he disposed that estate to trustees for payment of debts and family provisions, and with a direction that, upon the trust purposes being fulfilled, the trustees should convey to his eldest son Colonel Sutherland and the heirs of his body, whom failing to his second son James and the heirs of his body, whom failing to other heirs-substitute. The trustees entered upon possession of the estate, and held down to 1863, when Colonel Sutherland, the present trustee died, and the succession opened to his younger brother James. Upon that event, in pursuance of an arrangement with James, the estate was conveyed over to him on his undertaking to pay off the debt still affecting it, and thereafter in the same year James sold the estate to the Earl of Caithness, and paid off the debt out of the price. The present question was as to the effect of these circumstances upon a bequest by Colonel Sutherland, made by him in his trust-settlement dated in 1852, but which did not become payable till his widow's death in January, 1867.

The bequest in question was in a direction to his (the Colonel's) trustees to pay over the balance of certain sums belonging to him "to the trustees acting for the time under the trust disposition and settlement by my late father, to be by them applied in liquidation of the heritable debts due from the lands and estate of Brebster and Cansbay under their management." The controversy was whether this direction was now operative. It was maintained, on the one hand, that it had ceased to be operative, and that the bequest fell to the truster's heirs *ab intestate*, in respect (1) that the trust under the settlement of the Colonel's father was at an end, and there were no trustees to whom the money could be paid, or who could discharge the purpose of the bequest; (2) that the debts having been already paid, the purpose of the bequest had ceased to exist; (3) that in any view, the estate having been sold and passed out of the family, the object of the testator, which was to preserve the family estate, could no longer be accomplished. It was maintained by the representatives of James Sutherland that the bequest was truly intended for the benefit of the heir succeeding to the estate after the Colonel himself, and that, the purpose being to relieve that heir of the debt, it was immaterial in what form that

relief was worked out; and it was equally immaterial that the estate had been sold, seeing that that was a contingency which the truster must, or at least ought to, have had in view.

The L. O. (Jerviswoode) sustained the latter contention, and preferred the representatives of James. The next of kin of the trustee reclaimed; but the Court adhered, on the grounds above indicated.

MP.—**ABERDEIN'S TRUSTEES v. ABERDEIN AND OTHERS.**—*March 18.*

Trust—Vesting.—Multiplepoinding brought by the trustees of James Aberdein, merchant in Dundee, for the purpose of distributing his estate. The question arose upon the construction of the deceased's settlement, which, after providing annuities to his two sons, James and John, provided as follows:—

Ninthly, Declaring if either of the said James Aberdein or John Aberdein shall die leaving lawful issue, then and immediately after that event my said trustees shall get the whole property, heritable and movable, under their management, in virtue hereof, valued and appraised by two men, and shall either sell the half of the said property and subjects, as shall be thus ascertained, or borrow money to the amount of half the value of said property and subjects, and burden the said whole heritable property with the same; and my said trustees shall hold the moneys thus received in trust and for behoof of the child or children of such deceiver, and divide the same equally between or amongst them, share and share alike, if there shall be more than one, each to receive his or her share as they shall respectively attain the age of twenty-one years complete; and in the event of the death of any of said children, the share of the deceiver or deceivers to be divided among the survivors if more than one, or if only one, to be paid to such one on its attaining majority as aforesaid; but if there be but one, then the whole of said moneys shall be paid to such child on its attaining the age of twenty-one years complete, it being understood and declared that my said trustees shall divide the annual profits of said moneys to the said child or children until they shall respectively receive their proportions of the sums as above directed: *Tenthly*, Declaring also, that in the event of the said James Aberdein and John Aberdein both dying leaving lawful issue, then and in that case my said trustees shall, immediately after the death of the last survivor, sell and dispose of the remainder or half of the said trust-estate, the other half having been previously set apart for the heirs of the first deceiver, as before directed, and that either by public roup or private bargain, as they may think proper, and shall hold the free produce of the said trust-estate for the use of the child or children of the last survivor of my said two sons, and shall divide the same between or amongst the child or children of the said last deceiver, in the same way and manner as is provided for the children of the first deceiver; and farther declaring, that in the event of the first deceiver of my said two sons dying without lawful issue, his share and interest in the said trust property shall be held by my said trustees and applied by them for the use and behoof of the survivor, my said two sons, or his issue as aforesaid: *Eleventhly*, In the event of both the said James Aberdein and John Aberdein dying without lawful issue, or failing such issue, then, and in that case, my said trustees shall immediately thereafter dispose of the whole trust-estate under their management, either by public roup or private

bargain, as they may think fit; and my said trust-estate being thus converted into cash, I appoint my said trustees, after paying all necessary and proper expense attending the execution of the present trust, to pay to the treasurer for the time being of the Dundee Female Society, for the uses and purposes of that society, the sum of £100 sterling, and to divide the residue and remainder of the said proceeds as follows, viz:—One-fourth to the treasurer for the time being of the Gaelic School Society, etc.

Mr Aberdein was survived by his two sons, both of whom, however, are now dead. John died in 1856, leaving seven children; James died in 1865 without issue. The present competition arose among the children of John, and related to the share which would have fallen to the children of James, had he left children. The property was almost entirely heritage, and John's eldest son claimed the whole of the shares in question as the heir-at-law of the testator, on the footing that the trust-deed made no provision for the particular case which had occurred—viz., by the second deceiver of the two brothers dying without issue. The younger children, on the other hand, claimed that the whole property should be equally divided, contending that although the contingency which had occurred had not been expressly provided for, it had been so by implication.

The L. O. (Jerviswoode) found for the younger children, on the ground that there had been a constructive conversion of the heritable into movable, but this view of the case was not ultimately maintained. The eldest son having reclaimed, the Court to-day found for the younger children, on the ground that although the estate was heritable, the testator had provided in all cases for an equal division.

Their Lordships, while regarding the case as one of difficulty, were yet of opinion that there was sufficient evidence of the testator's intention to divide his property equally among his grandchildren. The grounds as expressed by the Lord Justice-Clerk, were shortly these:—(1.) It was clear that the truster intended to dispose of his whole property. (2.) The residuary bequests were to take effect only in the event of both sons dying without children. And (3.) In no part of the deed was there any indication that one grandchild should receive more than another.

OUTER HOUSE.

(Before Lord Mure.)

FOTHEINGHAM v. TITULARS, &c.—*March 12.*

Teinds—Process—Proof.—In cases of valuation of teinds, proofs have been taken by Commission, and a remit made to the Teind Clerk to prepare a state and scheme from the proof so led. That course involved the party seeking a valuation in considerable expense, and in this case the minister moved that the evidence be taken by the Lord Ordinary before himself, being the mode followed in ordinary Court of Session cases. The only doubt that existed about following that course was whether the recent Acts relating to forms of process were also applicable to teind causes. The L. O. in this case, after considering the question, appointed proof to be taken before himself.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTHSHIRE, PERTH—Sheriff BARCLAY.

A. v. HIS CREDITORS.

Cessio—Objection—Want of books.—An old soldier, with a pension, commenced a tavern. He kept no books, and after a very brief time became insolvent. He at once executed a trust deed in favour of his creditors, but they, dissatisfied with the state of his affairs, had him imprisoned on diligence. He then sued *cessio*. His state showed liabilities to the extent of £500, and his assets were estimated at £400. The creditors united in opposition, and their objections resolved into, 1st, want of books; and 2d, unsatisfactory account of the deficiency, which led to the presumption of concealment of funds. After three months' imprisonment, and a long proof on both sides, the Sheriff-Substitute (Barclay), on 23d January, 1870, granted *cessio*, with the following note:—

Note.—The formidable objection certainly is the not keeping of mercantile books. This is sought to be justified by an allegation that it is the practice of the insolvent's trade to keep no such books. There is no proof of the practice on the one side or the other. In one sense, it may be very convenient for a trader to abstain from keeping such a record, though as a safeguard there can be no fitter or better index to the state of his affairs and a caveat on his proceedings. To the creditors there can be no question of the great inconvenience as leading to the impossibility of their discovering the true state of the affairs of their debtor. Here, too, the debtor suffers severely, seeing that he is exposed to grave suspicions, that a record of his transactions might at once dispel, and so sustain his character for honesty. It is no good apology that the business is such as does not require a record. It could not be expected that every dram drank should be recorded. But there could be no difficulty in recording the additions made to stock and payments to the credit thereof, and the daily drawings. It is still less an excuse that the trader is not accustomed or unable to keep books. The answer is that he should not enter into business, or if so, should provide himself with the help of one who can perform this essential to fair and accurate trading. The plea of certain trades being exempt from book-keeping because of general practice is rapidly extending, and is without any authority, and must be checked. The Sheriff-Substitute can only repeat his view of the law as he expressed in the *cessio* of John Wilson, where on two successive occasions a very large business of cattle dealing terminated in a perfect mass of mistification, wholly impossible of solution.

The essential to receiving the humane benefit of our mercantile law, of keeping regular business books, has been long recognised in Scotland. So far back as 1786, when our trade was in its infancy, in a *cessio* the insolvent, a trader, "acknowledged, on being required to produce his books of account, that he had not kept any such. Observed on the bench that he had thus rendered it impossible to prove, in terms of law, that his bankruptcy had been occasioned by innocent misfortunes, and therefore the Lords found the pursuer not entitled to the benefit in question." (Morrison, 1793). This decision has been followed by a series of cases. The only exceptional case is one which it is feared has proved an encouragement to

neglect of this safety alike to the trader as to his creditors. (8th July, 1825, Fairburn, 4 Shaw, 157). In that case the insolvent is described "as an illiterate man (a term nowise applicable to the present insolvent), and a petty dealer in grain, purchasing small quantities which he took to market to sell in his own cart." After being *ten months* in prison, the Court at length awarded *cessio*, notwithstanding the want of mercantile books. This certainly affords no encouragement to any trader from abstaining to record his trade transactions, and looking at the whole series of the decisions, the Sheriff-Substitute feels satisfied that the Supreme Court will never lend its sanction to the prevailing opinion that where any set of traders are pleased to keep no books, therefore the law will hold them free from all liability to do so, or to account with their creditors for their intromissions with their creditors' money.

In the present case, the transactions of the insolvent are not nearly of the magnitude of those of John Wilson, nevertheless they are of considerable amount, and after every calculation it is not easy to perceive what has become of the profits on his business. These, especially when added to his pension, surely must have been sufficient at least to keep him square with his creditors, and not resulted in so great a deficiency as now appears.

Had the case come up when the insolvent had not been in prison, or for a brief period, the Sheriff-Substitute must have (as he has done in Wilson's case) refused *cessio*. But he has done otherwise on these considerations:—1st, There is no *positive* proof of possession, concealment, or misapplication of funds, however much there exists grounds of *suspicion*; 2d, The insolvent seems to have been for a time in defective health, and absent from his business; 3d, Before imprisonment, he granted a trust deed in favour of his creditors; and lastly, and perhaps chiefly, he has suffered imprisonment for a period of about three months.

A petition, after being followed by answers, was refused, with the following additional note:—

Note.—One circumstance does weigh considerably on the mind of the Sheriff-Substitute, namely, the large united host of opposing creditors. It does happen that a cantankerous creditor occasionally stands forth pre-eminently as vindicator of mercantile honesty, and the interests of the general body of creditors. But it is seldom that any number, such as in the present case, unite in severe measures against a debtor without some good grounds, though perhaps they may not be able to make them good by evidence.

If the Sheriff-Substitute were convinced that the insolvent is still in possession of funds, or from the improper absence of all mercantile records no credible or satisfactory account can be given for an obvious and great deficiency, he would be for indefinitely refusing *cessio*. But on carefully going over the states in process he has come to the conclusion that the deficiency is not *very great*, and consists chiefly, if not wholly, of *supposed profits*. The amount of these is ascertained on mere hypotheses founded on the profits of others bred to the business and carrying on their traffic in more popular establishments. The success of such persons can scarcely be predicated of an old soldier whose whole previous experience was with musketry *barrels*, and nowise acquainted with others of similar name, but by many thought to be nearly as deadly.

The Sheriff (Tait) affirmed this decision of the Substitute.

Act.—*Mitchell.*—*Alt.*—*Pinkerton.*

SHERIFF COURT AND QUARTER SESSIONS AT PERTH.

A AND B v. C.

Poaching Prevention Act, 25 and 26 Vict.—Conflict of Jurisdiction.—

Late at night of the 21st December three gamekeepers heard shots on a field, and, proceeding in that direction, they immediately came up to two men on the highway. One of the keepers, who is a constable, produced his baton, and insisted on the men being searched. On a search no game was found, but two fowling-pieces, in detached parts, in their pockets, with powder flask and shot bag. The men, who had been both previously convicted of poaching, made no statement where they were going. The constable thereon seized the two guns. Next day (22d Decr.) the two men presented two separate petitions to the Sheriff for restoration of their guns. On the 24th the constable made the statutory application to the Justices, and a warrant was obtained to cite. At the diet, the defenders pled *lis pendens*, because of their actions before the Sheriff. The Justices, on this, continued the cause until the Sheriff had decided the cases before him. Before the Sheriff it was pled, by the pursuers, that, being first in taking judicial proceedings, their actions must take the lead. The Sheriff-Substitute thereon pronounced the following interlocutor:—

Perth, 13th January, 1870.—Having advised the (short) closed record, in respect that proceedings have been taken under the Act 25 & 26 Vict., before the Justices of Perthshire, which evolves the question raised in the present action, and is the leading cause, sists procedure in the present action until the final decision of the Justices in said criminal complaint.

Note.—The question here admits of no doubt. The seizure was made on the 21st December. The present action for restoration of the guns was brought next day, and the complaint was made under the Act in the 24th of the month. The Sheriff cannot decide the issue raised on the face of the defence without deciding the previous question under the "Poaching Prevention Act." If he enters on that question, and holds that there was no contravention of the Act, this would form no *res judicata* so as to stay the judgment of the Justices, and who competently might come to an opposite judgment. If, on the other hand, he was to find the seizure *good* under the Act, then he could not forfeit the guns, nor inflict the penalty. But neither could this be *res judicata* to the Justices, who might proceed under the Act and come to an opposite decision. If the Justices acquit, the guns are *de plano* delivered to the persons from whom they were taken.

Where the seizer of the suspected articles is unreasonable in his delay in presenting his information, there might be room for a civil action for restoration. There certainly ought not to be a day's delay in adopting the proceeding. But whilst the pursuer set the example of extreme celerity, the delay was not great on the defender's part. To admit this mode of anticipation might easily defeat prosecutions under several statutes, and thus set the law at defiance under the very cloak of law. In short, disguise the matter as best can, the present proceeding is evidently sought to be made an interdict by the Sheriff on the Justices discharging their judicial functions, or, as it is termed in England, to enter up a *nolli prosequi*. Even had the proceedings under the Act not been commenced, the Sheriff-Substitute would have sisted the process for a space, that the defender might have recourse to the proper and only tribunal for the adjudication of the real and sole question at issue.

The Justices in this case no doubt exercised a proper, perhaps a scrupulous, caution. But they are bound now to proceed to the discharge of their duty, since the supposed interruption of their jurisdiction has been taken out of the way.

The Justices thereafter resumed the case, and, after long proof, convicted and forfeited the guns. Both defendants appealed to the Quarter Sessions. The appeal was heard by a full Bench. A number of preliminary objections were stated and repelled. But the two principal questions pled were—1st, that no conviction under the statute could stand unless game was found on the parties searched; and 2d, that there was no evidence that the convicted parties had been in trespass in pursuit of game. The Sheriff-Substitute (presiding) was of opinion that, under the second section of the statute, possession of “any gun, part of gun, or nets, or engines for the killing or taking game,” was sufficient to warrant a conviction, although no game was found on the parties; that the Act was complementary or supplementary to the Day Trespass Act, 2 and 3 Will. IV., cap. 68, under which the offence is, not the taking game, but being in trespass “in search or in pursuit of game.” It is not necessary, under either statute, that the trespassers should have been successful in their search or pursuit. This is the more obvious under the Supplementary Night Poaching Act, 7 & 8 Vict., c. 19, which requires the actual taking of game to constitute an offence on a highway. He held that the second section could not be read cumulatively, as pled for the appellants, as this would lead to the absurdity that poachers, though loaded with game, but having no instrument for their capture, they could not be proceeded against, and where they threw away the game, but retained the instruments, a similar result would follow. Therefore, though no case was reported in England or Scotland, where persons had been convicted, where there was the absence of game, he was of opinion that such was not necessary, if the offence or trespass could be otherwise established. The chairman stated that both in England and Scotland it had been held, not necessary to aver or prove on what particular land the offenders had been in trespass; but there must be reasonable proof that they had been unlawfully on *some* land in search or pursuit of game. It would not warrant being deprived of their guns or other instruments on the highway, and afterwards convicted, on the mere ground that they were going to commit a trespass and poach, but they must already have actually done so.

The case as to the commission of the statutory offence was a proper jury question. It was not a strong case for the conviction. On the one hand, the offenders were not seen on any land, and had no game on them when searched. On the other hand, shots were heard immediately before their being met with—no other persons were seen in the vicinity—recent foot marks were seen in a field on snow, though not identified with those of the appellants—their guns had the appearance of being recently discharged—both were convicted poachers—the time of night was suspicious—and they offered no account why they were at that place. The Bench adopted the law as given by the chairman; but on the question of fact four Justices voted for the conviction being affirmed, and four for it being quashed—the two convicting Justices declined to vote, but one expressed doubts of the soundness of the conviction. The chairman thereon gave his vote for sustaining the appeal, and the conviction was consequently quashed, with costs, and the guns ordered to be restored.

The pursuers thereon resumed their actions before the Sheriff, and craved costs. The Sheriff refused costs to either party: to the pursuers, because of the extreme haste of their application to the Sheriff; and to the defender, because of the delay of three days before entering his complaint, which he held should be done immediately on the search being made, and articles found to warrant a complaint.

Act.—Whyte—Mitchell.—Alt.—Gordon.

SHERIFF COURT, ABERDEENSHIRE, ABERDEEN.—Sheriffs
COMBIE MORRISON and JAMESON.

CHARLES DICK AND SON v. ALEXANDER KEITH.

Principal and Agent—Guarantee.—The circumstances of this case, are disclosed by the following interlocutor, pronounced by Sheriff Thomson:—

Having resumed consideration of this cause, Finds that, by the letter of guarantee founded on the defender, "with reference to the obligations undertaken" in the agreement (No. 3 of Process) between the pursuers and William Kiloh, and "in terms of the said agreement," guaranteed the pursuers against all loss and damage they might sustain "by or through the actings or intronissions of the said William Kiloh," to the extent of £500: That by the said agreement, the said William Kiloh bound himself to settle monthly, by bill at three months, for all ales or malt liquors sent to his order by the pursuers: Finds it admitted that the pursuers supplied goods on the orders of Kiloh, at the price of £99 17s 3d, on which sum he was entitled, in terms of the agreement, to an allowance of 35 per cent., amounting to £34 19s 3d: That to account of the balance, Kiloh granted to the pursuers his acceptances to the amount of £57 3s 6d: That only one of these acceptances, being a bill for £15 10s, was paid by Kiloh: Finds that a balance was thus due by Kiloh to the pursuers, of £49 11s 2d: That, on a sound construction of the above-mentioned letter of guarantee, the defender is liable to the pursuers in payment of the said balance: That the collection, by Kiloh, of debts due to the pursuers, does not fall within the said guarantee, and that the defender is not liable for the accounts said to have been collected by Kiloh, from John Hunter and William Tweedie: And with these findings appoints the case to be enrolled that parties may be heard on the application thereof, and for further procedure in the cause.

Note.—The interpretation of the agreement founded on is attended with considerable difficulty, and involves questions of importance in the law of principal and agent. Had Kiloh held merely the position of agent, as set forth in the first article of the agreement, the defender would not have been liable; but the terms of the other articles are peculiar, and, even when strictly construed, seem to lead to the conclusion given effect to in the interlocutor. Kiloh was to get a commission of 35 per cent. "from the invoice price of whatever ales may be sent on his orders, and that in full," *inter alia*, of his "undertaking the guarantee hereinafter more particularly specified." He further bound himself not only to perform the duties of the agency, but "to settle monthly, by bill at three months, for all ales or malt liquors sent to his order, said bills to be dated first or second day of the month immediately following that in which said ales or malt liquors may have been sent on his order." On the other hand, it was stipulated that the pursuers should allow Kiloh a deduction to the extent of one-half of his

nett invoice cost of any ales, etc., sent him by the pursuers, "and sold by the said William Kiloh to any of his customers which may turn out bad debts," no commission, however, being allowed in such cases on the other half of the price.

The security which Kiloh undertook to obtain was "for the proper fulfilment of all his duties and obligations" under the agreement. The security given by the defender was "against all loss and damage the pursuers might sustain by or through the actings or intromissions" of Kiloh.

It was ably argued, on behalf of the defender (1) that Kiloh did not undertake to stand *del credere*; and (2) that if he did, the defender was then cautioner for a cautioner, that the 8th section of the Mercantile Law Amendment Act did not apply, and that the pursuers were bound to discuss the principal debtor.

The Sheriff-Substitute is of opinion that a *del credere* guarantee is implied in the terms of the agreement. The goods, it is true, were invoiced directly by the pursuers, but the amount of the commission is fixed expressly with reference to a certain guarantee to be given by Kiloh. There was to be an annual "squaring and docquetting" of accounts, but it is thought that that must refer to the pursuers undertaking to bear half the loss on bad debts. To that extent Kiloh was entitled to credit himself in future transactions. The purchasers are spoken of throughout as Kiloh's customers, and not the pursuers'.

Whether an agent, acting under a *del credere* commission, is in the same position as a cautioner or not, seems a doubtful point in our law. Professor Bell says that in one sense he is not, as he is liable directly, without the benefit of discussion; while, on the other hand, he is not merely a *delegatus debiti*, as, if the agent fail, the principal may recover from the proper debtor, if the latter have not previously paid to the agent. In England it seems to have been settled that a *del credere* agent is truly in the position of a surety. *Morris v. Wasby*, 4 *Maule v. Selwyn*, 566, a case which overturns many previous decisions.

But the Sheriff-Substitute is of opinion that the undertaking by Kiloh to grant his acceptances monthly for all goods sent to him by the pursuers, taken along with the other clauses in the agreement which have been referred to, rendered him liable, whether his commission was *del credere* or not. Such an undertaking is equivalent to an assuming of responsibility (subject to the "concession" by the pursuers of a deduction, in case of the debts turning out bad), because thereby he "lulled all the suspicions of his employers, and caused them to dismiss all care about the solvency of the purchaser." *Smith's Merc. Law*, 7th Ed., p. 120.

Sheriff Jameson, on appeal, adhered.

Act.—G. C. Fraser.—*Alt.*—Charles Duncan.

THE

JOURNAL OF JURISPRUDENCE.

ON THE CONFLICT OF LAWS ADMINISTERED BY THE SUPERIOR COURTS IN GREAT BRITAIN.

No. VII.—CIVIL JURISDICTION—*Continued.*

I HAVE now discussed the effect of domicile in creating jurisdiction in the Courts of Scotland, and proceed, in the order already indicated, to discuss the next ground of jurisdiction having reference to the defender, namely:—

(b) *Residence*.—The jurisdiction founded on the residence of the defender is a convenient extension of the jurisdiction founded on domicile. It would, of course, be absurd to require as a preliminary to every action, such evidence of domicile as is requisite to support an action of *status*; and, therefore, as Erskine says, “a rule is received by custom, that where one has resided with his family for forty days immediately preceding his citation, is to be deemed his domicile, as to the question of jurisdiction,” (Ersk. I. 2. 16). On this passage the learned commentator (Macallan) remarks, “The author always presumes that a man has a family; of course, though the man has no family, the rule will be the same.” The fact is, the author’s expression “with his family,” is only a way of expressing the *character* of the residence as distinguished from the mere sojourn or visit of a person, who, throughout the time of such visit, retains his proper and settled dwelling-place elsewhere (*Paterson v. Fermour*, Nov. 20, 1672; M. 3724). And even though he has a family who do not reside with him at the place in question, the residence may still be such as to found jurisdiction over him, if he have no other fixed abode or house of his own (*Scott v. Anderson*, 10 S. 760; *Hamilton v. Lindsay*, 14 D. 844; *Joel v. Gill*, 21 D. 929).

The residence to found jurisdiction must not be confounded in principle with the kind of habitation necessary to warrant citation at the *dwelling-place* (in terms of the statute 1540, c. 75). The rule of practice in carrying out the provisions of that statute in the case where the house inhabited by the defender at the time of citation

is not his own proper dwelling-place, is, indeed, very similar to the rule touching jurisdiction, as I have elsewhere fully explained (*Law of Citation and Diligence*, p. 26). But although the habitation be a dwelling-place for the purpose of citation, it does not follow that it is such a residence as to found jurisdiction (Paterson, M. 3824; a *supr. cit.*) It would, at least, not be safe to argue from the *species facti* which have been held sufficient in the one class of cases, to a conclusion in a case of the other class. I think the true criterion in a question of jurisdiction is this: whether the residence is such as would be evidence of domicile if nothing could be inquired into except the overt acts of the defender during the forty days immediately preceding his citation upon the summons. Such a criterion seems to be both in harmony with the cases, and with the intention of the rule as stated by Erskine; namely, to provide a substitute for domicile which shall be easily ascertainable. This object seems attained by making the presumption raised by the facts of the last forty days a *præsumptio juris et de jure*. But whatever be the exact nature of the forty days' residence which would suffice, it is certain that if such residence definitely cease by the defender leaving the country before execution of the summons, the presumption is avoided and jurisdiction can no longer be sustained on the ground of residence alone (*Johnston v. Strachan*, Mar. 19, 1861; 23 D. 767).

I have already stated that I reject, as misleading, the phrase "domicile of jurisdiction," used to express the residence, which may be substituted for domicile in a question of jurisdiction. But it is not necessarily incorrect to say that this jurisdiction is founded *ratione domicilii*. And this expression has been used to mark an important distinction. Thus, it has been held (in the case of *Joel v. Gill*, 21 D. 938), that jurisdiction founded on residence, being jurisdiction *ratione domicilii*, is jurisdiction within the meaning of the Bankrupt (Scotland) Act, 1856, so as to enable a person without either funds, creditors, or business transactions in Scotland, to have sequestration granted to him upon his own petition, by a Sheriff in Scotland. I cannot, however, help remarking that the construction so put upon the statute is arbitrary, and if the point should again arise and be carried farther (as is not improbable after the recent changes in the law of Bankruptcy in England), it is possible that the word "jurisdiction," in the statute, may be interpreted to mean jurisdiction *ratione domicilii* in the strict sense of the word, in which sense alone it could confer upon the ensuing bankruptcy the capability of being recognised in an English Court to every juridical effect (*Re Blithman* L. R. 2 Eq. 23).

(c) The next ground of jurisdiction having reference to the defender is the *place of business*. And this ground, when pure and simple, applies only to the case of an incorporation, company, or trading firm, when sued in its character as a company or trading firm. By the *place of business*, I here mean the principal place of business, which is sometimes improperly called the *domicile* of the company or firm.

The jurisdiction so founded, although not properly founded on domicile, is founded on the *locus* of the business by way of analogy to *domicile*. It may therefore in every respect be properly described as founded *ratione domicilii*, and there can be no doubt that it will afford good ground of jurisdiction over the incorporation, company, or firm, for the purposes of *bankruptcy* or *liquidation*, as well as for all actions or processes of a more limited nature (*Stein's Case, infra*.)

It is on this ground that the North British and Mercantile Insurance Company has been held subject to the jurisdiction of the Court in Scotland, even in a question arising out of a contract made in the course of their English business (*Thomson v. North British and Mercantile Insurance Coy.*, 6 M'Ph. 310). In the report of that case I find no reference to the Acts of Parliament incorporating the Company, which, being the foundation of their title to carry on business, must contain the *ratio decidendi* of this case. I believe that although the London Board of this Company has certain co-ordinate powers, the office in Edinburgh enjoys some kind of precedence, and the Court probably took cognizance of this fact, without an express reference to the Acts. But I conceive it would scarcely be held that an English Company having a branch board or agency in Scotland could, without arrestment *ad fundandam jurisdictionem*, be sued in Scotland on one of its English contracts. It seems possible, however, that a Company may carry on business in both countries in such a manner that either place of business (*e.g.*, that in Glasgow or that in London), may be deemed its principal place of business for the purposes of jurisdiction, and in such a case the Company is said, in the improper sense above-mentioned, to have two domiciles. (*Stein's Case*, Jan. 20, 1831, 17 F. C., 77, 81; 1 Rose, 479, 482, *per* Lords Robertson and Bannatyne).

(d) The next ground of jurisdiction having reference to the defender is actual presence within the territory. But this does not by itself seem recognised in Scotland as a ground of jurisdiction against the defender, although the fact may be made use of for the purpose of compelling submission to the jurisdiction by methods to be hereafter detailed. And as the methods here referred to belong rather to the executorial power of the Court than to the jurisdiction which it claims over the person of the defender, I shall consider them under the last of the heads of this subject, namely, *forum remedii*.

(e) The last relation of the defender to the territory which has been held to found jurisdiction, is *origin* or *nativity*. The defender must bear that relation to the territory of Scotland which, but for the Union, would have involved allegiance as a Scotchman. But in order that jurisdiction may be thus founded over him in the Scotch Courts, he must be personally present in Scotland, and the pursuer must avail himself of that presence by citing him to the action personally. In other words, the jurisdiction which the Courts originally had over him at his birth in Scotland revives immediately on his re-entering the territory, and may then, by his being personally cited within the

territory, become fixed upon him so as to give the Court jurisdiction in every subsequent step of the process. This ground of jurisdiction is explicitly stated by Lord Kames (Hist. Law Tracts, No. 7 *Courts*), who maintains that the *locus originis*, like the *locus contractus* and *delicti*, will sustain jurisdiction provided only the party be found within the territory. Doubt was at one time supposed to have been thrown upon this ground of jurisdiction, owing to the decision in *Grant v. Pedie*, in the House of Lords (1 W. & S. 720). In that case the House, under the direction of Lord Eldon, reversed the interlocutor of the Court of Session, who had sustained their jurisdiction over the defender *ratione originis*, although he had not been in Scotland at all during the proceedings, and had only been *edictally* cited to the action. In giving his judgment, Lord Eldon said: "The question is, whether a Scotchman may have a judgment pronounced against him in his absence—being neither represented by his being in Scotland in person himself, nor having any property whatever there, nor having entered into a contract there,—whether, in the course of the proceedings, a judgment may be pronounced against him in Scotland? and whether, having got that judgment against him in Scotland, the pursuer may bring an action on the foundation of that judgment against the party in this country." Now it is clear that in this case the want of personal presence in Scotland, and of actual intimation of the proceedings to him under any judicial authority, were elements of the greatest importance in the decision, and therefore the deliberate opinion of the Scotch Judges in a subsequent case (*Ritchie v. Fraser*, 15 D. 205) to the effect that *nativity* of the defender in Scotland combined with his personal citation within Scotland gives jurisdiction, must be looked upon as decisive of the point. In *Sinclair v. Smith* also (22 D. 1475, 1483), while other grounds existed sufficient to support the jurisdiction, the opinion was reiterated that *nativity* was a consideration by no means immaterial. That personal citation within the territory, combined with nativity, should suffice to give jurisdiction, is perfectly consistent with Lord Eldon's decision in *Grant v. Pedie*, and the method is quite as easily defensible on principle as the arrestment *ad fundandam jurisdictionem*, which has been sustained by the House of Lords itself (*Forum remedii*, *post*.)

3. *Forum rei gestæ*, etc.—The grounds of jurisdiction under this head range themselves under sub-divisions, which may be designated by the following expressions:—(a) *Ratione contractus*; (b) *Ratione delicti*; (c) Administration, Acquisition of heritage by universal title, and Reconvention; (d) *Ratione rei sitæ*.

(a) Jurisdiction *ratione contractus*.—After consulting as well our own institutional writers as the passages of the civilians commonly referred to the subject of jurisdiction *ratione contractus*, I find nothing so pertinent and so accurately descriptive of the principles of action adopted by our Scotch Courts in this matter, as the original passage of the Pandects (from Ulpian's Treatise *Ad Edictum*), in which this ground of jurisdiction is described. The passage is as follows:—"Si

quis tutelam vel curam, vel negotia, vel argentariam, vel quid aliud unde obligatio oritur, certo loci administravit et si ibi domicilium non habuit, ibi se debebit defendere, et si non defendat neque ibi domicilium habeat, bona possideri patietur. Proinde et si merces vendidit certo loci vel disposuit vel comparavit videtur nisi alio loci ut defenderet convenit, ibidem se defendere. Numquid dicemus eum qui a mercatore quid comparavit advenâ vel ei vendidit quem scit inde confestim profecturum, non oportet ibi bona possidere sed domicilium sequi ejus? At si quis ab eo qui tabernam vel officinam certo loci conductam habuit in eâ causâ est ut illic conveniatur? quod magis habet rationem. Nam ubi sic venit ut confestim discedat, quasi a viatore emtis vel eo qui transvehebatur, vel eo qui præternavigat emit, durissimum est quotquot locis quis navigans vel iter faciens delatus est, tot locis se defendi. At si quo constitit, non dico jure domicilii sed tabernaculam, pergulam, horreum, armarium, officinam conduxit, ibique distraxit, egit, defendere se eo loci debebit." (Dig., V. 1; De judiciis, l. 19, §§ 1-2). Again, Papinian [libro III. Responsorum] "Argentarius ubi contractus est, conveniri oportet, nec in hoc dilationem, nisi ex justâ causâ dari, ut ex provincia codices afferantur. Idem in actione tutelæ placuit," (l. 45, pr. of title last quoted).

The above passage from Ulpian accurately marks out the distinction between a contract made in connection with some regular business carried on within the territory on the one hand, and a contract merely made in the course of a flying visit or temporary sojourn on the other. The failure to keep this distinction in mind has been the cause of the chief puzzles that have arisen about this ground of jurisdiction. The principle on which the distinction rests may be this; that, in the one case, an implied promise is made by the contracting party, that he will be found within the territory when the contract comes to be enforced; and in the other case, no such promise is made or implied. The ground of jurisdiction as stated by Ulpian involves the combination of two elements. 1st, A fixed place, be it house, office, shop, stall, wharf, or shed, where business of any description is regularly carried on by him. 2dly, A ground of action arising out of the dealings made in connection with such place of business. This is precisely the ground of jurisdiction recognised in our law as founded *ratione contractus*. An instance in point, is the case of M'Gown (Nov. 22, 1822; 2 S. 35; N. E.), a spirit dealer, having a shop in Glasgow, but residing out of the limits of the burgh. He had accepted a bill, dated Glasgow, and payable at his shop there. The bill was duly protested for non-payment, and M'Gown was personally charged on an extract registered protest from the books of the burgh. In a suspension, the Court held that he was subject to the jurisdiction of the magistrates in respect of this debt.

The case just cited relates to the jurisdiction of an Inferior Court, but the principle would clearly apply if a person having his dwelling place in England should carry on business at a shop or office in Scot-

land. Cases more commonly occurring in practice arise out of companies having their principal offices in England, but having a branch establishment in this country, especially railway or navigation companies carrying on the business of carriers within Scotland. Of this kind is the case of *Bishop and Mandatory v. Mersey and Steam Navigation Company* (Feb. 19, 1830, 8 S. 558). The Company, who carried on the trade of carriers between Liverpool and Glasgow, had their head office at Liverpool, a branch office at Glasgow, and an agency at Greenock, and the action arose out of a contract to carry goods from Liverpool to Greenock, and failure to deliver at the latter place. The citation was given to the Company, by leaving a copy in the office of Alex. Law & Company, and citing personally the two partners residing in Glasgow. On the same principle, jurisdiction was sustained in the case of the *Aberdeen Railway Company v. Ferrier* (January 28, 1854, 16 D. 432), which arose out of a contract made with the company at their station in Brechin in their capacity of carriers from that place to London. The company were held properly sued in the sheriffdom of the latter place. It is, I think, on a principle similar to that of the cases immediately above cited, that a married woman engaged apart from her husband in any trade or employment in this country, is liable to an action arising out of that trade or employment, although the husband is resident and domiciled abroad (Orme, 12 S. 149; *Ritchie v. Barclay*, 7 D. 819). For here it is evident that she could not be subject to the jurisdiction of the Court *ratione domicilii*, and the jurisdiction is rather founded *ratione contractus*, i.e., on contract made in a course of dealings within the territory.

The passages from the Digest above quoted contemplate some business carried on within the territory. But they implicitly assume that *a fortiori* there is jurisdiction if the person to be charged had his domicile in the place at the time of making the contract. This is the case contemplated by Erskine as the foundation of jurisdiction *ratione contractus*. He says (Inst. I. 2-20), "Civil jurisdiction is also founded *ratione contractus*, if the defender had his domicile within the Judge's territory at the time of entering into the contract sued upon, though he should not have his domicile there when the action is brought against him." This is the *ratio decidendi* in the case of *Sinclair v. Smith* (July 17, 1860; 22 D. 1475). This was an action of damages for breach of promise of marriage. The defender admitted that he was a native of Scotland, and that at the time of the alleged promise, both parties were resident and domiciled in Scotland. The summons was served upon the defender personally when in Dundee, on a visit for about a week. Doubtless the ground of personal citation combined with origin, would have been sufficient had there been nothing else. But owing, I suppose, to the cloud which was still supposed to rest upon the *forum originis* since *Grant v. Pedie*, the Judges preferred to rely upon the circumstance that both parties were domiciled in Scotland at the time of the alleged promise, and the

defender having been personally cited, jurisdiction was therefore well founded *ratione contractus*. This is precisely the sense in which Erskine speaks of jurisdiction being founded *ratione contractus* in the passage above quoted. Whether indeed a contract can have a *locus* in such wise as, according to our law, will give jurisdiction *ratione contractus*, unless the party to be charged had at the time of making the contract either his ordinary domicile or some place of business within the territory, is a question which I should not be prepared to answer in the abstract. I know of no case, with the exception to be immediately referred to, where our Courts have sustained jurisdiction on the ground of contract, without the presence of one or other of these conditions. It was indeed a ground of jurisdiction recognised by the civil law, C. iii. 17 (*Ubi conveniatur*) l. 8, that payment had been agreed to be made at a certain place; and in this case the creditor had the option of suing the debtor in the Courts of that place, or by an *actio arbitraria* in his *forum* of domicile, by which he might recover the damage he sustained from being obliged to seek payment in a different place from that agreed upon; and this *forum* of the *place of payment* appears to have been recognised by the Court of Session in an old case mentioned by Kames (Hist. Law Tracts, p. 234), where the Court, though they refused to sustain themselves judges betwixt two foreigners with relation to a covenant made abroad, thought themselves competent where it was agreed that the debt should be paid in this country. In a bill of exchange, it is usual to mention a place of payment, but this is done, not with the object of constituting a *forum* of jurisdiction, but with reference to the rules of negotiation (*Mackenzie v. Hall*, Dec. 12, 1854, 17 D. 168). And before following out summary diligence on a bill of exchange, the protest ought to be registered in the books of a Court which has jurisdiction over the party to be charged, either *ratione domicilii*—by reason of his domicile or residence (*Don v. Keeley*, 12 D. 1016)—or *ratione contractus*, in the proper sense—i.e., by reason of the place of his business in the course of which the bill was granted (*Sutherland*, 16 D. 339, 341), the first being the safer course.

Jurisdiction founded *ratione contractus* will not furnish a good warrant for edictal citation. The citation must be personal in the case of an individual; at the place of business, in the case of a company or firm cited as such.

(b) Jurisdiction founded *ratione delicti* calls for little observation. The distinction between actions arising out of contract and those arising out of delict is not very philosophical, but it has been so long familiar to lawyers, as to have become not wanting in precision. Delict, as a ground of jurisdiction, is fully discussed by Lord Kames in the tract above mentioned. Like the *locus contractus*, the *locus delicti* must be combined with personal citation, in order to found jurisdiction. If it be pursued by the public prosecutor (in which case the delict is a *crime*) the *locus delicti* furnishes exclusively the *forum* of jurisdiction. If the prosecutor be a private party, it is usually at

his option to prosecute in the jurisdiction furnished by the *locus delicti* or in that furnished by the domicile. Most of the authorities bearing on this point will be found cited in the case of *Johnston v. Strachan* (28 D. 766). In that case itself no point of principle was decided, the Court holding that neither the *locus contractus* nor the *locus delicti* were within Scotland.

(c) Administration, etc.—When a person dies leaving movables within Scotland, the law recognises no title in any one to receive and deal with any part of them, until the confirmation of an executor, and then only in or through such executor. (It must be observed that “executor” in Scotch legal language, is the common name for the officers designated in England by the terms “executor” and “administrator”). Pending the appointment of an executor, the goods formerly belonging to the deceased are said to be *bona vacantia*, and to belong to the *hereditas jacens* (*Smith's Trustees v. Grant and others*, 24 D. 1151),—a kind of *fictitious person* possessed of and capable of acquiring rights protected by law against invasion, but having no active title to sue for debts or to grant discharges for them. Confirmation, when granted by the Commissary—now the Sheriff of a county or district—transfers to the executor all the rights of this fictitious person, together with the active title to sue and grant valid discharges for debts. If the deceased died domiciled within Scotland, the Commissary within whose district he died domiciled is the proper Judge to grant the confirmation. If he died domiciled out of Scotland, the Commissary of Edinburgh is the proper Judge to grant the confirmation (*Douglas v. Johnston*, M. 4846; 1 W. IV. c. 69, § 3). In the statute here cited, I assume that the expression “furth of Scotland,” means “domiciled furth of Scotland,” and I believe that it is so understood in practice. In § 3 of the statute 21 and 21 Vict., c. 56, relating to executor-creditors, the expression for the analogous case is “domiciled furth of Scotland.” In granting confirmation to the estate of persons dying domiciled out of Scotland, the Commissary will follow as far as practicable the grant of the Court having jurisdiction in testamentary matters in the country of the domicile. The grant of the Commissary extends to such of the movables as happen to be in Scotland, and, therefore, *in relation to the goods*, the Judge granting confirmation has jurisdiction *ratione rei sitae*.

When an executor is confirmed, he remains, although domiciled and resident out of Scotland, subject to the jurisdiction of the Court of Session, in any proceeding for making him accountable to the persons beneficially interested in the estate. *The administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased* (*per Lord Cottenham, Preston v. Melville*, 8 Cl. and Fin. 12). The confirmation, though commonly called an active title, is, in fact, a title both active and passive.

There is another passive title known in our law, which founds jurisdiction against a party equally with confirmation itself. This

is called *vitious intromission*, and is simply incurred by meddling with or taking possession of any part of a movable estate within Scotland of a deceased, without the lawful authority granted by confirmation. The only difference between the two titles is, that the latter (which is contemplated in law as a delict) will, unless purged by confirmation afterwards granted to the intromitter, subject him to the whole liabilities of the deceased. Whether this ground of jurisdiction will authorise edictal citation of the defender, is a point which I am not aware to have been expressly decided, but, from the reason of the thing, it seems clear that edictal citation must be competent. The ground here is similar in principle to that of reconvention—a *quasi* contract by which, having taken advantage of the authority of a Scotch judicature to obtain a legal title to the goods, the executor undertakes to account, under the authority of the Court in Scotland, to all persons interested in the estate. And as, by having confirmation granted to him, he makes this implied undertaking; he clearly can be in no better position if, by vitious intromission, he obtains possession of the goods without any lawful authority.

The same principles apply to the heir who makes up titles to the Scotch heritable estate of a predecessor; or who (whether by *præceptio hereditatis* or *gestio pro haerede*) incurs one of the passive titles known in law with regard to heritage. If a person make up titles to an estate merely for the purpose of conveying or joining in a conveyance to another, but without taking any benefit from it, he does not incur a passive title (*Blount*, M 9731. *E. of Fife v. Duff*; 6 S. 698; *Mackay*, 13 S. 246). But it is different where the heir has been *lucratus* by the inheritance, which he has received on condition of so conveying away the estate in question (*Nisbet's Trustees v. Halket*, 13 S. 497; *Irvine v. Kirkpatrick*, 2 Rob. Ap. Ca. 475).

I have already observed, that the jurisdiction of the Court over a person, who has obtained title by confirmation to the movable estate within Scotland of a testator or intestate, is similar in principle to jurisdiction founded by *reconvention*. That principle must now be explained. It is thus stated by *Paulus* in a passage of his work *Ad Edictum*, transcribed in the Digest:—"Qui cogitur in aliquo loco judicium pati, si ipse agat, cogitur excipere actiones, et ad eundem judicem mitti." The meaning of this passage was keenly canvassed in the case of *Thomson v. Whitehead* (Jan. 25, 1862; 24 D. 321). On the one hand, it was contended that, the moment a person became a pursuer in a Court, he was held by the Roman law capable of being pursued in the same Court, in all actions, whether connected or not connected—whether of the same nature or not of the same nature—with the action of *convention*. On the other hand, it was contended that the passage bore a much narrower interpretation, and implied nothing more than a rule of procedure similar to a remit on the ground of contingency, from one Judge to another; and other passages were cited from the *Corpus Juris* of Justinian, which seem

to support the latter hypothesis. But whatever be the case in the Roman law, it appeared clear that, by our own law, reconvention applies only where the two claims *conventionis* and *reconventionis* arise in *eodem negotio*, or where they are *ejusdem generis*; and only where the two claims may be tried simultaneously, and terminated either by a single sentence, or by two sentences contemporaneous or nearly contemporaneous (24 D. p. 344).

The principle so laid down was applied in the case of *Longworth v. Felverton* (Nov. 5, 1868, 7 Macph. 70), where an attempt was made to reduce or set aside certain decrees in previous actions of declarator of marriage, etc. It was held that as the action in which the decrees sought to be set aside were pronounced, was finished and out of Court, and incapable of being revived, the whole foundation was wanting for reconvention (Compare the cases of *Ord v. Barton*, 9 D. 541; *M'Ewan's Trustees v. Robertson*; *Baillie v. Hume*, 15 D. 265, 267; *Morrison & Milne v. Massa*, 5 Macph. 130).

Where the ground of jurisdiction is reconvention, the citation may, of course, be edictal (*Baillie v. Hume*, 15 D. 268). The ground itself implies that no other means of citation are generally available. Of course, in this as in all cases where it is intended that the judgment obtained upon the action should be enforceable in England, care will be taken to preserve evidence that the defender in the action *reconventionis*, or his authorised agent, has actual notice of it; for the constructive notice given by *edictal citation* can never, except in proceedings within Scotland, supply the place of actual notice to the satisfaction of an English (or probably any foreign) Judge. *Schilsby v. Westenholz* (in the Queen's Bench, before Mr Justice Blackburn and a special jury). *Pall Mall Gazette*, Feb. 28, 1870. Story Conf. (sec 546.)

(d) *Ratione rei sitae*.—The actions and processes in which jurisdiction is founded *ratione rei sitae* in the strict sense, may be generally described as actions whose object is to affect the title to heritable property in Scotland. Of this kind are adjudications, and under the same head may be comprised inhibitions and every species of real diligence. And the jurisdiction may be thus founded not only in an adjudication or process of real diligence, but in an action of constitution of a debt for the purpose of securing it upon heritable property in Scotland (*Ferrie*, 9 S. 854), as well as in a reduction of deeds affecting heritable property (*Shaw*, 7 M'Ph. 449). This ground of jurisdiction applies not only if the defender is personally cited within the territory, but although he is out of the territory and is resident and domiciled out of the territory—that is, by citation proceeding on letters of supplement if he is within Scotland, and by edictal citation if he is furth thereof. And the jurisdiction holds not only where heritable estate is in question, but where the object of the process is the disposal of the *ipsum corpus* of a movable within the jurisdiction of the Court (*Ritchie v. Wilson*, 6 S. 552. *Bannatyne v. Newendorff*, 3 D. 429). To this ground may also be referred the

cases where a principal defender being within the country, it is necessary to call other parties for their interest to make good a decree against estate which is in the hands, or under the control of such principal defender. Thus, in an action of furthcoming against an arrestee in Scotland, the Court has, for the purposes of the suit, jurisdiction over the common debtor. I should think also that in every case where an action for divorce is properly brought in the Court of Session, the Court must have jurisdiction over a co-defender; although in a recent case it seems to have been thought necessary to establish another ground of jurisdiction over him (Fraser, p. 156 *ante*). Whether arrestment in the hands of a person residing in England and not otherwise subject to the jurisdiction of the Scotch Courts, can have any effect to interpel him from payment to his creditor in Scotland against whom arrestment has been used, is a question on which I know of no positive authority. But if the Courts in Scotland have jurisdiction over the creditor *ratione domicilii*, I incline to think the debtor might safely decline to pay until the creditor had got the arrestment loosed. At all events the creditor can protect himself from the adverse claims, either by an interpleader suit in Chancery, or by a motion under 1 and 2 Will IV., c. 58, in the Common Law Court where he is sued.

R. C.

“THE HEREDITARY NATURE OF CRIME.”

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THE above is the appropriate title of a paper recently read before the Medico-Psychological Association of Great Britain, and now reprinted from the Journal of that society. The author (Dr Bruce Thomson) has had peculiar opportunities of thoroughly studying his subject, by his lengthened official connection with the General Prison for Scotland at Perth. There he has seen crimes of every shade, and criminals of both sexes, and of all ages, classes, and conditions. He has not been an idle spectator of the continual flux and reflux of the criminal stream which has periodically flowed to that great reservoir or cesspool of ostensible retributive, but, unfortunately, wholly remedial justice. He has well introduced his painful but deeply important subject with these words:—“On the border-land of lunacy lie the criminal population.” It is a debateable region, and no more vexed problem comes before the medical psychologist than this, viz, where badness ends, and madness begins in criminals? The inmates of asylums and of prisons are so nearly allied, that “thin partitions do their bounds divide.” Indeed, the reader of Dr Thomson’s pamphlet, before he reaches its close, must be convinced that the debateable region is no longer *terra incognita*, but its position in science well defined, and that insanity and criminality are nearly convertible

terms. The difference is only one of degree and extent, and the difficulty is where the line of demarcation may be drawn with any approach to certainty. The old book declares the fact in representing the scriptural maniac, so clearly the representative of the criminal class, when brought under holy aspirations, as "clothed, and in his right mind." And so too the prodigal son, after his sojourn with his congenial swine, seeks his road homeward only when "*he comes to himself.*"

Dr Thomson does not assume to himself having made any new discovery when asserting that crime or criminal proclivities are similar to mental and corporeal disease—hereditary, and propagating themselves in families from generation to generation. He founds his arguments not merely on his own observation and that of contemporaneous authorities, but he cites very ancient *dicta* for the same principle of hereditary taint. He notices the Hebrew proverb introduced into Scripture record, "The fathers have eaten sour grapes, and the teeth of the children are set on edge." Aristotle admitted the validity of the plea set up by a man charged with beating his father—"My father beat his father, and my son will in his turn beat me, for it is in our family." This plea of compensation and recompensation is well put. Pliny records that in the family of Lepidus at Rome, there were three in the line, not successively, but at intervals, born with a similar eye, covered with a web, which seemed in some mysterious way connected with the obliquity of the moral vision of these eyesores in social life. Montaigne in his Essays mentions a similar inheritance of mental and physical infirmity in generations as illustrated by his own family. Dr Thomson refers to long lines of family descent whose very names are generally received as types of social and moral depravity. Of course he cites the Borgias, the Farnese, and the Visconti; but we scarcely are prepared to class in the same rank "in our own country the line of the Royal Stuarts." Imprudent they certainly were, and in consequence unfortunate, but we cannot altogether subscribe to their unvaried criminality.

Dr Thomson divides his discourse into distinct logical heads. 1. His first is, "*that there is a criminal class distinct from other civilised and criminal men.*" He admits that there are criminals who occasionally appear, not from the class or caste of criminality, but from the upper strata of the social fabric, such as Palmer and Pritchard, and he might have added many others. Besides, we could enumerate, on the opposite side, not a few who, early escaping from the nursery of vice and contagion of crime, have distinguished themselves as much for integrity as ever their ancestors had disgraced themselves and their names by the opposite of vice in every form. This is perhaps the vulnerable point of the author's theory—the heel joint of his armour—and as to which we may speak more fully hereafter.

2. The Doctor takes for his second position, "*that there is a distinctive criminal class is shown by the typical, physical, and mental*

peculiarities of the class." This he illustrates by reference to miners, fishermen, and he might with still greater force have added that large mysterious and migratory class, the gypsies. But the author does not surely assume that all those numerous and some of them eminently industrious sections of society are akin to the criminal classes. He means only to illustrate the distinctive appearance of such sections when contrasted with the social mass. When he takes up the criminal class proper, he graphically photographs them thus:—"The common thief, robber, or garotter have all a set of coarse, angular, clumsy, stupid set of features and dirty complexion. The women are all ugly in form, and face, and action, without the beauty of colour, or grace, or regularity of features, and all have a sinister and repulsive expression in look and mien." "They are," in the language of an accomplished writer, "as distinctly marked off from the honest industrial operative as 'black-faced sheep from the Cheviot breed.'" As popular language is often the very best index of common understanding and feeling, this fact may account for the use in the higher circles of the term denoting a bad member of the social flock, "as a black sheep," and in the lower ranks by the still more forcible expression, "a gallows-faced villain," similar to the scriptural equivalent of the "dead fly." Dr Thomson, from his own observation, backed by "all the authorities, governors, chaplains, surgeons, and warders of great prisons in England, Ireland, and Scotland, concur in stating that prisoners as a class are of mean and defective intellect, generally stupid, and many of them weak-minded and imbecile." The author gives a quotation from the notes of a medical friend, whom we suppose is the late talented Dr Malcom of Perth, who for nearly half a century was physician to Murray's Royal Asylum near Perth, and for a quarter of a century the predecessor of Dr Thomson in the General Prison. "That eminent physician has left a record of his experience of the entire obliquity of all moral feelings and propensities of their nature and their impracticability. Neither kindness nor severity has any influence on such people, but they go on from day to day in devising and doing wrong, although their conduct entails upon them further privation." "In all my experience, I have never seen such an accumulation of morbid appearances as I witness in the *post mortem* examinations of the prisoners who die here (General Prison). Scarcely one of them can be said to die of one disease or ailment; every organ of the body is more or less diseased, and the wonder to me is, that life could have been supported in such a diseased frame. Their moral nature seems equally diseased with their physical frames. On a close acquaintance with criminals of eighteen years' standing, I consider that nine in ten are of inferior intellect, but that all are excessively cunning." This last opinion might lend no small aid to the monkey being the supposed derivative of humanity—a theory now so much in vogue. The *Liberty-gibbet* class have no small family likenesses to their assumed ancestry of the woods. Dr Thomson coincides with the opinion of his friend, and confirms it by the fact that out of 5,432

inmates of the General Prison, 673 were placed on his Register as "requiring care and treatment on account of their mental condition." The forms of mental imbecility assumed by these 673 were as follows: 580 were imbecile or weak-minded; 36 were also so, with the addition of being suicidal, and no less than 57 was epileptic." This shows 12 per cent. of the total number of prisoners, and this exclusive of those who, becoming insane, had been transferred to the lunatic department. Dr Thomson adds that the imbecile state of mind was, with the greater number discovered on admission, or within a few weeks thereafter, and from congenital causes. Thus the effect of the prison treatment (as has often been supposed) could have no part in producing the mental defect.

3. The fourth position of Dr Thomson is, "*the family histories of the criminal class indicate that crime in them is hereditary.*" He first illustrates this point from the analogy of brutes, especially of the canine tribe. But we confess we do not well see the triteness of the analogy. We doubt whether the pointer and shepherd dog (his chief illustrations) take their peculiarities from their inherent nature rather than from the antecedent training of their parentage, and transmitted to their posterity. We doubt whether any dog is pupped with all the education of its sire so as not to require equal training to bring it to the level of its ancestry in canine qualifications. The author gives some very startling instances of criminality strictly entailed on family descent, both male and female. Three brothers had families of fifteen members, of whom fourteen were utterers of base coin, and the fifteenth committed arson. But their occupation of coining, however illegal by statute, is more of a craft than a crime—more of a trade than a natural vice—*malum prohibitum* rather than *malum in se*. It would not prove that the butcher, the baker, or brassfounder, though fourteen of these families adopted the same calling, became so by hereditary taint, apart from finding a business made to hand. It cannot be supposed that dykers and ditchers, "hewers of wood and drawers of water," have been hereditary since the enslaving of the Gibeonites, with their mouldy bread and clouted shoes. It can scarcely be predicated that these labourers of the land were congenital Gibeonites, and so of necessity, like poets born and not made. Occasionally have a few of this class, in spite of birth, burst the family thralldom, and ascended to the upper classification of the social mass. England has produced many *Harrow-boys*; but Scotland pre-eminently has its *Plough-boy*.

But some of the other instances recorded by the author are more to the purpose. Such as that 109 prisoners out of 50 families being within the same prison at the same time. Several similar instances are given from other prisons, confirmed by reports from French prisons. The author has not given any educational statistics showing how far that element has been present or absent in the persons whose degraded position he details. This omission is the more to be regretted with the educational question now so prominently before the public.

4. The fourth division of the subject is, "*the hereditary taint and tendency to crime farther appears from the resemblance in the transmission to other hereditary maladies.*" We humbly object that here there is something like the assumption of the whole question. It is taken for granted that crime is hereditary, because other maladies are understood to be so. The *physical* fact is undoubted; insanity, cretinism, epilepsy, dipsomania, are all evidence of that fact. That a large proportion of prisoners are weak-minded, or next to insane, may be equally undoubted, but it by no means follows that criminality, gout, cancer, and all other corporeal maladies are convertible terms, or that the one must of necessity flow in the same course as the other.

5. The fifth position of the author is, "*the incurable nature of crime in the criminal class.*" This is by far the most important and startling issue raised by the author. The text, however, is very complex. First, it assumes that there is a criminal class; second, that active crime must be developed in that class from generation to generation; and lastly, when so developed it is incurable. This goes to the root of the question, and is at once destructive of all secondary punishments as remedial or curative of the criminal, if belonging to a certain class. There can be little doubt that imprisonment hitherto appears to have had no possible benefit on the criminal. The fact is established by one of the author's tables. Of 904 prisoners in the General Prison for sentences, none of them less than three years, as many as 440, or nearly one-half, on liberation renewed their career of crime, and found their way back to their former abode or asylum, whilst others very likely have elsewhere found a similar home. The General Prison, with its severe seclusion on the one hand as punitive and deterrent, and on the other with its effective staff of chaplains, teachers, Bible readers, warders, libraries, and workshops as curative, has thus been proved a miserable failure.

The melancholy position lastly adopted by Dr Thomson was, in the early ages of Christianity, assumed by Celsus, the first avowed opponent of its divine doctrine. In a passage preserved by Origen, the sceptic writes, "Those who are disposed by nature to vice, and accustomed to it, cannot be transformed by punishment, much less by mercy, for to transform nature is a matter of extreme difficulty." Origen to this nobly replied, "When we see the doctrine (Christianity) which Celsus calls *foolish* operate as with magical power—when we see how it brings a multitude at once from a life of lawless excesses to a well-regulated one—from unrighteousness to goodness—from timidity to such strength of principle, that for the sake of religion they despise even death, have we not good reason for admiring the power of this doctrine!"

Dr Thomson concludes his interesting paper with the following conclusions:—

1. That crime being hereditary in the criminal class, measures are called for to break up the caste and community of that class.

2. That transportation and long sentences of habitual criminals are called for in order to lessen the criminal offenders.

3. That old offenders can scarcely be reclaimed, and that juveniles brought under very early training are the most hopeful, but even these are apt to lapse into their hereditary tendency.

4. That crime is so nearly allied to insanity as to be chiefly a psychological study.

Agreeing in general with most of these conclusions, we regret that Dr Thomson has not stated specifically the mode in which his first suggestion could possibly be carried into operation. The days of the Pharaohs of Egypt, and the Herods of Galilee are long past, never to return.

One observation must occur to the attentive reader of the paper now under observation—that if crime be hereditary in certain classes, and in them incurable, then, from parity of reasoning, ought virtue and honesty be matter of inheritance in the virtuous classes, and alike indestructible. Doubtless the Theologian includes all classes under the ban of original sin. Such being the normal state of humanity, the virtuous become exceptional to the general rule; nevertheless, it is undoubted that whilst, on the one hand, examples are without number of generations succeeding each other branded with crime, there are still not a few where individuals have escaped from the contagion, and have become eminent in the paths of rectitude. On the other hand, there are many instances, though perhaps not so numerous, where children, born of parents eminent in virtue and high in the social scale, have sunk to the lowest pitch of guilt and infamy. It must be admitted that talent and genius are at least not heirlooms, and every one acquainted with history, ancient or modern, can cite numerous instances where the mantle which adorned the sire has never fallen on the son, or inspired his genius, or gave to him any name, save being the son of one known to fame.

These remarks lead to the remark that Dr Thomson does not sufficiently allow and give place to the early training, education, and associations surrounding those unfortunately born of the criminal and degraded classes. From the first opening of the infant mind, exposed to no influence save that of evil, the result could scarcely, without miracle, be expected to be otherwise than a positive photograph of evil. Huddled together in an underground cellar, unfit for bestial, herded with the dregs of society, without regard to age or sex, and never hearing the name of the Divine Being, except in blasphemy, such waifs must of necessity be stranded on the very outset of the voyage of life. There may be much in the hereditary taint, but we are of opinion there is still more in hereditary training. As well expect the vine to flourish and yield its grapes in the dark and damp recess of a vault, as virtue to be developed in the haunts of profligacy. The crucial experiment would be to take a new-born child from the elegant mansion of the rich, unsullied and good, and place him in the polluted atmosphere of the realm of vice, and that in exchange for a child which first sought to breathe in its polluted atmosphere. Neither child need ever learn its social history; let each be brought up as the

adopted child, the one of fortune and the other of misfortune, and it would be then tested whether the child of the criminal, despite all its advantages, inherited the criminal propensities of its ancestors, whilst the child of virtue manifested all the noble peculiarities of its origin.

Whilst we very much indorse the opinion of the author, that crime, when it has become habit in the habitual criminal is, *humanly* speaking incurable, it is alike kindness and mercy to such chronic criminal, as necessity and justice to society, to seclude them from the busy world, the varied temptations of which they have become wholly unable to resist. Hence the Habitual Criminals Act, had it not been a clumsy abortion of legislation, would have proved a most salutary provision, likely in time to be attended with much benefit. In point of fact, the only palpable benefit at present arising from imprisonment is first to the criminal, that he cannot commit further crime during the period of his seclusion, and society is equally protected from his rapacity. So soon as the prison doors are open to him, so are the flood-gates of passion, the streams of which flow out all the stronger because so long pent up.

In this country it is difficult for the man of good character to obtain remunerative employment, and it is next to impossible for one who, having the mark of Cain, can only refer for his past history to the black records of the police and prison. It is therefore not matter of astonishment that so great a portion of released prisoners return to their former abodes, but that so few. Perhaps on inquiry it would be discovered that many of the absent have found an abode in a lunatic asylum or poor-house, and not a few, worn out by a career of vice, have found rest in the grave, "where the wicked cease to trouble." There is a growing opinion that our system of police and criminal justice is much at fault; the system of a series of short imprisonments suffice merely to break, but can never mend character; it may and does brand the offender, but never can efface the dark mark. There is something actually ludicrous in the criminal passing from the bar of the Police Court to that of the Sheriff, always taking as it were a diploma in crime until he completes his *curriculum*, and receives his highest degree at the hands of the Judges of Justiciary. The Industrial School has done much by withdrawing neglected children from the pestiferous atmosphere of vice and crime, and these institutions are calculated to do much more with a greater extended application. The Reformatory is an admirable institution for those more advanced in age, and who have already begun their career of crime. We argue for children being sent to the former at the earliest age, whilst in the latter the age might be extended—for the lad and lass still in their teens, without any education save in vice, is still to be reckoned as a mere big child in the eyes of the law, and as matter of fact. Should these remedial measures be unavailing, then the first sentence for a deliberately concocted crime should be one of considerable length, and should this prove abortive, then a prolonged sentence is the only safe measure alike for the criminal as for society. In some circumstances,

where there are strong proofs of radical reformation, it would be of the utmost consequence that help should be given to such hopeful persons to remove to some well-chosen colony where the labour market not being overstocked, there might be reasonable hope of the liberated prisoner making a livelihood by honest industry. In this way even transportation, if a proper place of disposal could be found, might prove far more prudent and successful than the nondescript and anomalous punishment of penal servitude. We believe that a more liberal and prudent administration of the poor law would greatly tend to diminish crime. If, as the author argues, that there is a close connection between crime and insanity, it will not be difficult to establish a still closer connection between poverty and both these growing evils. Statistics will establish that the increase of pauperism is coincident with the like increase of crime and insanity.

We feel inclined to mention a curious but striking fact which has come under the observation of magistrates, and which goes far to support the theory of Dr Thomson as to the alliance between crime and insanity. It is well ascertained that thieves generally follow one uniform line of thieving, and have a predilection for the same class of objects as the peculiar subjects of their predatory appropriations. This is still more apparent in the cases of inebriates who steal only to gratify their intemperate cravings. Thus some have confined their furtive achievements to the garden, and the apple has often through life been the proud desire of their heart. Others follow the walk of hen stealing, dog stealing, shop lifting, bleaching green spoliation; and others distinguish themselves in the varied departments of the science of acquisition of the properties of others. We have heard of a rather handsome girl, the child of parents certainly not of the criminal class. She had the misfortune of having what she at least thought to be peculiarly small feet. Her parents declined to gratify her vanity by the oft-repeated demand for ladies' shoes of the newest and finest, and consequently the most costly, patterns. She early commenced to steal from every shoe shop in town, but never anything except Cinderella's slippers. After having run the gauntlet of police and Sheriff, she at length stood at the Bar of the Circuit Court, charged with shoe stealing, with some dozen previous convictions of theft of the same class of article. She received sentence of transportation. Such was most fortunate for her. In Australia she became the wife of an early settler, who had become very wealthy. She then could gratify her vanity, and her kindness of disposition was evidenced by her remitting home ample funds to pay for the outfit and passage of a brother and another sister to the colony.

Another case is well known of a drunken navvy, who worked hard at times, but drank the harder on pay nights; and when inebriate, he obtained the means of further gratifying his beastly appetite by laying hands on all the spades of his co-labourers which were within reach. On being brought before a local Judge for the usual crime of stealing spades, with some dozen of previous convictions (by the way,

always proceeding upon most penitent confessions), the Judge somewhat irreverently declared that the culprit had fairly earned for himself the appropriate title of the "*Knave of Spades*."

The most extraordinary case of this kind is one which was tried in December, 1858, before a Circuit Court. Singularly enough, the criminal's name was "*Thomas Grubb*." He was charged with stealing, at different times, some half-dozen of *tubs*. There was the aggravation of some dozen previous convictions before police and Sheriff, but all for the same uniform theft of *tubs*. He received sentence of transportation for seven years, but was liberated for good conduct in 1862. No sooner did he obtain his liberation than he completed the final edition of "*The Tale of the Tub*," and once more, in April, 1867, he appeared at the same Circuit bar charged with the theft of a *tub*, with the old *tubular* score against him, and he then was passed into penal servitude. This man was industrious and honest when sober, but when drunk was unable to resist temptation. It was the practice of the inhabitants of the town of his residence to have tubs of a certain size, and to expose them at their doors. In this way they became easy of acquisition, and it appeared that the fellow had actually stolen the same identical tub three or four times in succession. It also appeared that this vessel just yielded the price of a gill of spirits, so it was, in his table of liquid measure, the proper equivalent *one tub = one gill*.

The whole inquiry is one of deepest interest, and the ground being now so very ably broken by one so eminently qualified to deal with the subject, we trust that the question will meet with the attention it not only deserves but demands, and that farther inquiry may lead to sounder legislation in dealing with crime and criminals, so that the prison, like the magistracy, may really become a deterrent to evil doers, and a protection to those who do well.

PAPERS OF THE SCOTTISH LAW AMENDMENT SOCIETY.*

ON THE PROCEDURE IN CRIMINAL PROSECUTIONS IN SCOTLAND PRELIMINARY TO TRIAL.

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It can scarcely have escaped the notice of those who at all observe the indications of public opinion, that from more than one direction there have been signs of a disposition to criticise, with severity, the manner after which, among us here, investigations into crimes are conducted,

* The papers selected for publication by the Council of this Society will, by arrangement, be published in the *Journal of Jurisprudence*; but the Society is not to be understood as becoming in any sense responsible for the other contents of the *Journal*; and the conductors of the *Journal* do not assume any responsibility for the style or opinions of the Papers of the Scottish Law Amendment Society.

and the treatment which persons accused of crime undergo before trial; and that in both these respects a preference is more or less unreservedly shown for the usages observed in England. It is seldom quite prudent to disregard such indications of opinion; and the result of such disregard, on the part of those who have some acquaintance with the matters thus criticised, not unfrequently is, to leave the discussion of them with persons uninformed, and even otherwise disqualified for any intelligent appreciation of the difficulties which surround these questions, and thus the public mind is misdirected, and efforts towards a wise legislation are obstructed or defeated. It seems to me one of the uses of such a Society as that I have now the honour to address, that it affords opportunities for the free discussion of all such questions, before an audience with such a diversity of training and experience that mere fallacies are hardly likely to pass undetected, and the omission of any important element of the question under consideration can hardly fail to be discovered and supplied. With this conviction, I have ventured to undertake, although on a very short notice, to bring before the Society the subject named in the heading of this paper. Without farther preface I go straight to the subject of my remarks; and in fulfilling the duty I have undertaken, I propose to state briefly, and as clearly as I can, what is the procedure to which our attention is called; with such comments as occur to me on the points on which I understand it to have been subjected to unfavourable criticism.

The only public officers whose functions I shall feel it requisite to notice in their mutual relations, are (1) the Lord Advocate; (2) the Sheriffs; (3) the Procurator-Fiscal. The criminal matters disposed of without the intervention of the Sheriffs are relatively so unimportant that for the present purpose they may be left out of view.

I. The Lord Advocate, (to borrow Mr Erskine's words) as "representing the community, has authority from the Sovereign, who is vested with the executive power of the State, to sue every criminal without the concurrence or even contrary to the will of the party injured:" and in order to the discharge of his high office as public prosecutor, is invested with large and general superintendence. He has the assistance of the Solicitor-General, and of four deputes; the senior having special charge of the cases prosecuted before the High Court in Edinburgh, known as the Home Circuit, and embracing the three Lothians; and each of the other deputes in rotation having under his care one of the three districts of Scotland, included respectively within the north, the south, and the west Circuits; and having also opportunities of reference for advice to the other Crown Counsel in consultation; and the Crown Agent is the medium of communication between them and the local authorities.

II. The Sheriffs have in this sphere very important duties, which, with few exceptions, are discharged by the resident Sheriffs. For our present purpose we have to consider them as magistrates or executive officers. In the words of Sir George Mackenzie, "The Sheriff is in

effect the Supreme Justice of the Peace, to whom is mainly entrusted by the law the security of the quiet and tranquillity of that part of the kingdom which is subject to his jurisdiction."

III. In regard to the Procurator-Fiscal, who is appointed by the Sheriff, and is removable at his pleasure, I remember that the excellent Judge, whose recent removal by an early death we are all deploring,* described him to me, in homely but graphic phrase, as "the hand of the Sheriff." But I shall avail myself of the careful definition of the office given by an eminent *living* Judge (Lord Colonsay) in the Report by a Select Committee of the House of Lords "on the Police Systems of Scotland," (17th July, 1868). His Lordship's words are:—"That local officer discharges within the range of the Sheriff's jurisdiction, not only the duty of conducting such criminal trials as take place before the Sheriff, but also the duty, with reference to all crimes, whether competent to be tried before the Sheriff or not, of prosecuting the preliminary investigations, and collecting and preparing, in proper form, the evidence on which the public prosecutor is to determine—1st, Whether a criminal trial should be instituted; and, 2d, If a trial is to be proceeded with, how the crime or crimes should be charged; what witnesses, documents, or articles of evidence should be adduced or founded on, and in what Court the trial should take place. The Procurator-Fiscal is an executive officer under the Sheriff, who is also an executive officer responsible for due vigilance with regard to the investigation and suppression of crime within his county, but in such matters both the Sheriff and the Procurator-Fiscal may be directed by the superior authority of the Lord Advocate."

IV. It may be right, also, to mention, in this inquiry, the county constabulary, which is now, under the Act of 1857, provided in every county (except Orkney and Zetland), by whom the Sheriffs' and other warrants are executed, and who also have certain limited duties in the apprehension of offenders, by virtue of their office, and without any special warrant; and whose proper function it is to discover and to report to the Procurator-Fiscal, for the information of the Sheriff, all crimes committed within the county, and to follow out inquiries under their directions.

We have here a thoroughly organized, and to some extent a *centralised* system, the bearing of which on persons accused of crime will be best illustrated by following, in order, the various steps of procedure. A police report, for example, is laid before the Procurator-Fiscal, containing in the body of it information of an alleged crime, and having appended to it the statement of the witnesses as made to the constable charged with the inquiry. The first question that arises is, Shall there be any further proceedings? The case may be, (1), a case of alleged assault, but from the statements of the witnesses as reported it may be apparent that probably one of the parties in the quarrel was about as much to blame as the other, and that in the

* Lord Barcaple, then recently deceased.

public interest there is no sufficient reason for any criminal prosecution—there will, therefore, be no farther proceedings. Or, (2), the police report may disclose a clearly defined, but a trifling, case of assault or of breach of the peace, and in ordinary course the person informed against will be cited to appear on an early day for trial, either under the Act of 9 Geo. IV., c. 29, commonly known as Sir William Rae's Act, or under the Summary Procedure Act of 1864: the most important difference between them being, that under the former statute the Sheriff must take notes of the evidence, while under the latter no record of the evidence is preserved. Or, (3), a more serious case may appear on the face of the report, and the examination of the accused be thought necessary; and the Procurator-Fiscal will present a petition to the Sheriff, for a warrant for the apprehension of the accused, and for the citation of witnesses in order to a precognition. If satisfied of the propriety of this course, the Sheriff will grant the warrant.

On his apprehension, and with as little delay as possible, the accused is brought before the Sheriff for examination in reference to the charge against him, and a statement, technically called a "declaration," is taken from him. The rules as to this step of the procedure are well defined, and are so far favourable to the accused, that he is warned that he need not answer questions or make any farther statement than he thinks fit, and that what he does state will be written down and may be used as evidence against him in the event of a trial. The Sheriff has now to consider the case, with the aid of the declaration emitted. In a considerable number of cases the explanations given by the accused are so satisfactory that he is at once discharged from custody. In a much larger number of cases, the accused, after having made his declaration, is committed to prison, under a warrant, "for futher examination," i.e., to allow time for further inquiry into the case—equivalent to a remand in England; at this stage, the accused is not entitled to liberation on bail, as of right; but in trifling cases the privilege is usually conceded, and until after trial and sentence he may not have entered a prison.

The next step is the taking of the precognition, that is, the examination of the witnesses named in the police report or otherwise discovered, and the writing down and authentication of their statements, which are not usually given on oath; but may properly be given under that sanction when the ends of justice are thought to require it. The record of this *quasi* evidence is commonly also called the "precognition;" but the word seems more appropriate to the inquiry itself. The accused is not present at the precognition. I observe that Baron Hume mentions (II., p. 82, note) that it was one of the directions given by the Court for taking up of dittay, 4th March, 1709, "That none be present with the Clerk at the examination of the persons cited by the Sheriff to give up dittay." Formerly, as I understand, the Sheriff was always present; but for a long course of years the practice in this respect has been otherwise; so far as I

can learn, almost uniformly otherwise; the only county in which I have ascertained that the Sheriff has of late years in all cases personally taken the precognition being the county of Zetland; but other exceptions may probably be found among some other of the remoter counties or districts. From the first report of the Law Courts Commission (pp. 65-66) I see that questions were put to Mr Beatson Bell, now resident Sheriff at Cupar, as to his practice in this respect. He was asked, "Do you attend the taking of precognitions yourself?" and his answer was, "In serious cases; as a general rule, in all the pleas of the Crown." So far as I have been able to ascertain, the practice here stated is and has long been the general practice in Scotland; with considerable variation in degree, according to the different local circumstances, and especially the amount of labour imposed otherwise on the resident Sheriffs. I am aware that some persons, whose official position and professional eminence entitle their opinions to the highest respect, have expressed themselves as strongly opposed to the propriety or even to the lawfulness of the practice, in this respect, which has long been observed; but I am also aware that during the years of its observance many eminent lawyers, and I think a majority of the present Judges, have been Sheriffs of counties, and have not felt it to be their duty to enforce a stricter adherence to the earlier usage; and I am also confident, that the actual practice has been well known in the Crown Office; and I can find no trace in the "Regulations to be observed in criminal and other investigations," thence issued from time to time for the direction of the Procurators-Fiscal, and more recently re-issued, after revision, in the form of a volume, of anything like a censure on the practice referred to, but on the contrary, I find there some indications of its recognition as a fact. I am farther satisfied that the arrangements, following on the Sheriff Courts Act of 1853, were made on the footing of such being the practice; and that if the earlier practice is to be restored, these arrangements will require re-consideration.

It is to be observed that the precognition is not always taken most conveniently, whether as regards efficiency, expedition, or expense, at the seat of the Court. It is very frequently taken in the locality in which the crime has occurred, the Procurator-Fiscal going thither with the least possible delay to make his investigation; with the obvious advantage of having opportunities for the examination of the *locus*, either by himself or his witnesses, and of having more at command any additional evidence which may be suggested—for one witness discloses another. I am informed that in my own county of Roxburghshire, long ago, when a cotemporary and acquaintance of Walter Scott's was Sheriff-Substitute, it was his practice, along with the Sheriff-Clerk, to accompany the Procurator-Fiscal in such journeys through the county, which I gather to have been taken a good deal at leisure; but since that time they have been taken by the Procurator-Fiscal *alone*, or at most with his clerk, unless in those exceptional cases in which a personal inquiry by the Sheriff on the spot has been judged advisable. If in future

the precognition is in all cases to be taken before the Sheriff, as a rule, and with few exceptions, it will have to be taken at the seat of his Court; for in very few counties could the Sheriff undertake to accompany the Procurator-Fiscal in such journeys, without his absence seriously interfering with his other duties. Even if taken at the seat of the Court, it is clear to me that in some counties, with only the present official staff, the precognitions could not be taken, in all cases, by the Sheriff personally, without injurious delay, if indeed they could be taken at all without the ordinary civil business of the Court falling into confusion.

It is not to be inferred from anything I have stated, that I am unfriendly to any change on the present practice, which may tend to the better administration of justice. On one point, I take it, there is no room for difference of opinion—"that the Sheriff is responsible for the whole preliminary inquiry or precognition," whether taken by himself personally or by the Procurator-Fiscal under his direction and superintendence. The narrower question remains, whether it would be better that in all cases it should be taken before the Sheriff himself. To this question, whether regarded as affecting the public interest or the interest of the person accused, I can well conceive that conflicting answers may be given. There seem to me advantages on either side. A stricter personal supervision of the precognition by the Sheriff would no doubt better inform his mind as to the facts, and might afford considerable securities against slovenliness, useless repetitions, and irrelevancies. On the other hand, it is not all gain, surely, to the accused, that his future Judge shall have prepared the evidence for his trial, and can only by one of those mental or moral efforts, which habit seems to render possible, if not easy, divest himself of prepossessions as to the guilt of the accused. Many of us will remember the remarks of Baron Hume, in this relation, with reference to an earlier similar practice on the part of the Judges, (II, p. 83). "Certainly in every point of view it is better and more suitable that the Judges, like the assize, should enter on the trial without any previous knowledge or impression of the case; and it is now a long time since there was any room for a complaint in that respect." When it is considered that of the whole criminal trials after commitment fully three-fourths, or from 75 to 80 per cent., are tried in the Sheriff Courts; and that of those so tried, about 90 per cent. are tried by the resident Sheriffs, the significance of the preceding remarks will be apparent.

After the precognition has been taken, whether before the Sheriff or by the Procurator-Fiscal, it is the duty of the Sheriff to determine whether, and when considered in connection with the declaration of the accused, it affords such *prima facie* evidence of guilt as to require his commitment in order to trial, or, as the warrant runs, "until liberated in due course of law." If his decision be in the negative, the accused, if in prison, will be liberated; if already liberated on bail,

his bail bond will be delivered up to him. Should the Sheriff be of a contrary opinion, he will grant a warrant of full commitment for trial, on which the accused will be imprisoned until the trial takes place, unless he be entitled to liberation on bail, and be able to find the requisite security.

At this stage of the proceedings the very important Act of 1701 may be said to come into operation. Its regulations are minute and anxious; and especially when taken in connection with the periodical returns as to untried prisoners, they afford perhaps nearly all the security that can be attained by statutory provisions against unjustifiable imprisonment and undue delay of trial. The Act provides (1), that the warrant must proceed on a signed information; (2), that it must specify the cause of imprisonment; (3), that the accused shall be served with a duplicate of the warrant; (4), contains very stringent provisions to secure to the accused the privilege of liberation on bail, unless, generally, the offence be a capital one; and (5), limits absolutely the possible duration of imprisonment without trial. I think these admirable provisions would be still more perfect, if the warrant of commitment itself had the effect of the Letters of Intimation to the Lord Advocate, now requisite in order to the full operation of the Act. After the accused has been committed for trial, unless the case as disclosed in precognition is clearly one proper for summary trial before the Sheriff, (in which case the Sheriff may instruct the Procurator-Fiscal so to prosecute it) the precognition is completed and forwarded by the Procurator-Fiscal to the Crown Agent for the consideration of Crown Counsel; who have to determine (1) whether any criminal trial shall take place; and (2) if so, in what Court, and under what conditions, and to give their instructions accordingly.

I observe that my friend Mr M'Lennan (our indefatigable Secretary) in a recent paper on criminal statistics read by him before the Social Science Association, states (vol. vii, p. 387) that "the commitments in respect of which there were no trials ought really to have appeared in a list of undetected crimes." This statement appears to me to proceed on a misapprehension, though not an unnatural one. It leaves out of view the cases which are reported to Crown Counsel after commitment, in which there is little or no difficulty anticipated in proving the acts committed; but where there is room for difference of opinion as to the propriety or policy in the circumstances of a criminal prosecution. From my own limited experience, I should infer that the number of these cases is very considerable. In nearly all of them, I take it, the accused has been liberated on bail, so that he suffers no practical hardship from the warrants of commitment having been granted, but is, in fact, in a better position than if he had been detained under a warrant "for farther examination," until the instructions of Crown Counsel should be received. It may be said, that even before applying for a warrant of apprehension, the Procurator-Fiscal may in doubtful or difficult cases apply for the advice of Crown Counsel. It only remains to be added, that any indictment brought

against the accused must be served not less than fifteen days before the diet of trial, and must have appended to it a list of the witnesses, and also of the assize or jury.

Such being the proceedings preliminary to trial, the question remains, are these on the whole satisfactory, or, do they admit of improvement? and if so, in what respects?

We have here, I think, a well organised, coherent system; regulated, as regards the treatment of persons committed for trial, by the most stringent and minute statutory provisions; in other respects dependent chiefly on usage for its sanctions, and having thus a considerable measure of flexibility. The policy favoured by the Lord Advocate for the time may be more or less a policy of centralization; tending to relax local energy, to encourage frequent reference for advice to Crown Counsel, probably resulting in warrants of commitment being signed very much as a matter of course, on the representation of the Procurator-Fiscal, and without the Sheriff having seriously applied his mind to the evidence; and this all in good faith, and with the assurance that the case, when reported, will be carefully considered by Crown Counsel before the accused is put on his trial. A different policy will have the effect of making the local authorities more sensible of their proper responsibilities; and by securing the careful perusal of the precognition by the Sheriff, not only will the Crown Counsel feel assured that they have his deliberate opinion on the case, but any imperfections of the precognition will have some chance of being detected and rectified. I cannot speak from my own knowledge, but from the complaints I have frequently heard from Crown Counsel, and the anxious phraseology of the Crown Regulations under this head, I infer that in many instances there is room for improvement in the preparation of the precognitions.

I think farther, that the official position of the Procurator-Fiscal has by degrees become more and more recognised as distinct from that of the Sheriff; that the Procurator-Fiscal has in modern practice come to be less "his hand" and more his coadjutor. In putting one of his questions, at a meeting of the Law Commission, Lord Colonsay pointed to a "time, not very long ago, when the person who communicated with the Lord Advocate was in some counties the Sheriff-Substitute," (1st Report, p. 55). I think that time has passed, probably *never to return*. At the same time, I think that the Procurator-Fiscal, however his position may be improved, must continue to act in subordination to the Sheriff, otherwise we have a divided and thus an impaired responsibility. The characteristic of the system which would probably most strike an English observer, would be its privacy. From first to last, until the accused is served with the libel, to which he has to answer, he has no information who his accusers are, or what is the precise nature of their evidence. His only information is to be gathered from the statement of the alleged offence made to him by the examining magistrate, and the questions put to him when he is

making his declaration. All the communications with reference to the precognition are regarded as strictly confidential, as well as all communications between the Procurator-Fiscal and the Crown Agent in reference to any case under consideration. No person, other than those officially engaged in the inquiry, may be present when the declaration is taken. When the accused has been committed for farther examination, he is kept in a state of seclusion; his friends or legal adviser have no right of access to him until he has been committed for trial. It has been suggested that the accused might be present at the precognition, taken with a view to determine whether he ought to be committed for trial, with a right, of course, of putting questions to the witnesses, and probably with the aid of a legal adviser. I don't think much good would come of this; probably the precognition would lose greatly more by the reserve of the witnesses than the accused would gain by the opportunity of interrogating them. His interests would in a large proportion of cases also suffer from his putting rash, ill-judged questions, which would compromise him. And if the public were not present, and with no detailed record preserved of all that passed, I fear that the proceedings might be subject to serious misrepresentations. I confess that I can see my way to no middle course between the system of privacy pursued in Scotland and that of publicity in use in England. In the detection and punishment of crime, so far as I may presume to judge, our system has been successful; and I am not of opinion that on the whole it has operated prejudicially on the persons accused of crime. No doubt it demands a constant and high sense of responsibility, and serious, habitual performance of duty, often in difficult circumstances, on the part of the officers charged with the execution of the law; and should these officers ever unhappily lose the public confidence, I do not think that the present system could be longer maintained. But it has considerable advantages. It is ready and rapid in action. It often enables a person unjustly accused of crime to be cleared of the accusation without being subjected to the pain of a public exposure; and it affords less opportunity for making away with evidence anticipated as adverse to the criminal than the system of public procedure. I believe the results, in so far as they admit of comparison, show the Scottish system to be more successful than that in observance in England. We have all noticed that *there* the eminent Chief-Justice of the Queen's Bench has been proclaiming the necessity for a public prosecutor; and I observe that a bill to effect this object was last night introduced in the House of Commons; and in this respect we have for a long time had the advantage over England. We can hardly anticipate that, in a country, in which a conviction of the necessity for all judicial proceedings being public has become so deeply rooted, that even the unclean revelations of the Court of Marriage and Divorce are made in public *on principle*, and with the assent of the best and wisest of its Judges, any system such as exists in Scotland could possibly be accepted.

Any change in this respect is more likely to be with us than with them ; but for my part, I have no desire to precipitate it. So long as our system is worked as it has hitherto been, I think it is on the whole satisfactory ; and that probably the changes proposed would not be for the public advantage. But I cannot conceal from myself, that for its success it depends (possibly to an extent hardly quite safe) on the good faith, discretion, and conscientious discharge of duty of all entrusted with its execution—a consideration which may well stimulate those of us who are thus engaged to greater diligence and earnestness in the fulfilment of those important functions which affect so directly the personal liberty of Her Majesty's subjects.

LORD BARCAPLE.

LORD BARCAPLE was born on 16th April, 1808, and died on 23d February, 1870. In his case, the profession and the public were called upon to mourn the untimely death of a learned and sagacious Judge, in the noon-day usefulness of his career. He had not accomplished all that he was capable of doing. For this he had not time allowed him ; nor had he at any time that vigorous health which is necessary to the successful execution of designs lying beyond the call of immediate duty. His life affords little of the interest of incident. He was removed by taste and temperament from the irritating turmoil of political life, and we cannot call to mind any great trial in which he was ever engaged.

He came to the Bar with one advantage denied to many. He had not to struggle with the *res angusta domi* ; and he had family connections through whose influence he early obtained opportunities of professional labour. It is a mistake to suppose that it was only when he was appointed Solicitor-General that he came into practice. His fee-book shows the reverse of this. Undoubtedly it was only about that time that senior practice poured in upon him in such quantity, that if he had remained at the Bar a few years longer, he would have amassed a large fortune—large enough, at all events, to satisfy his moderate and philosophical wishes. But the great mistake of his life was the acceptance of a seat on the bench. After the experiment of a few months, he himself came to this conclusion. Besides the loss of half his income, he found the labour hard, the life monotonous, and his health broken. He set himself a standard of duty so high that even he could not reach it ; and the result was, his untimely death.

He held all the offices which fall to the lot of professional success, except that of Lord Advocate. It was fortunate for his own happiness that he never held this one. The patronage would have been to him a source of misery. He would have endeavoured to exercise it, not according to the exigencies of party, but the rights of conscience.

Of course in a country like this, which is ruled by parties, he could not have accomplished this, and hence there would have been grief and vexation and disappointment with himself. Yet his friends anticipated for him a career of usefulness, if not of fame, in a Parliamentary life. Bold in his speculations as to the necessity of reforms in our law, liberal and tolerant in his views, he had also much thought upon and studied those questions of legal and educational reformation which are now the questions of the hour. His conciliatory disposition might have helped to a peaceful settlement of all of them. But it was not to be; and there was no one who contemplated with more alarm than himself the probability of being called upon, in Parliament, to make the trial.

As a pleader at the Bar, he was earnest and persuasive, seldom rising above the ordinary conversational style in which a clause in a trust deed is construed, but never falling into vulgarity and incoherence. There was one case in which he felt strongly, and pleaded it with a power seldom equalled in forensic oratory. The now famous case of *Longworth v. Yelverton*, if it settled no new law, did, at least, excite an interest in the three kingdoms seldom accorded, even to *causes celebres*, in which are involved merely the interests and happiness of an over-confiding woman. The Solicitor-General had got his letter appointing him a Judge, on the week prior to the hearing of the case before the First Division of the Court. So far as he was concerned, he gave his services gratuitously. There was no call upon him in any way to continue longer in the cause. According to the usual course his attendance as a counsel was ended. But he determined that even in these exceptional circumstances, Miss Longworth would get justice, if he could effect it. It cost him three hard days work to prepare himself for the debate. He made his speech,—clear, effective, and eloquent; and then, bowing to the Court, he retired from the Bar which he had so long adorned.

The office of Solicitor-General, when he had it, was no sinecure. During all the years he held it, he was never absent for a single day from the High Court of Justiciary,—his practice being to begin the study of his cases for the Monday trials on the Saturday evening. In this latter particular he was not to be commended, and was often remonstrated with. If these Saturday evenings had been made a little less filled with business, and somewhat more thrown away (as persons as fully occupied as he was, did), Maitland would not have looked so sombre, sad, and weary on the Sundays.

He was a member, of course, of a great many Boards, and the writer of this paper can specially speak to the patient discharge of duty at one of them. In every case—and they are 150 a year—in which written opinions were required to be given by the legal members of that Board, he was always asked to give his, and never failed.

At one period of his life he edited the *North British Review*, and contributed to that periodical a number of articles which are as

excellent specimens of literary criticism as ever appeared in the *Edinburgh*, even in its high and palmy days. I refer in particular to his review of Stanley's *Life of Arnold*, in the second volume, which stands side by side with a droll Thackerayan article by John Thomson Gordon, on an absurd poem called "King Alfred," in six volumes of eight and forty books, and extending to one hundred and thirty-one thousand lines. Empson's notice of *Arnold's Life* has been justly referred to as the best essay he ever wrote; but in vigour and philosophy it is far surpassed by that of a man to whom literary composition at the time was new. The articles of Maitland will bear republication in a collected form, and no more worthy memento of him could his friends possess.

To those who knew the man, the notices that have appeared of him since his death are not the mere outpourings of affectionate and indiscriminating friendship. In his case we can indulge in the language most grateful to our feelings, without overstepping the decent limits of propriety and plain sincerity. His career throughout was pure and honourable; and it is a service to the world when one, exalted by intellectual capacity above so many of his fellows, holds out to them, in his person, the example of a blameless life.

He came to the bar in the year 1831; was made Sheriff of Argyllshire in 1852; Solicitor-General in 1855; and one of the Judges in the Court of Session in 1862. He was predeceased by his wife who died in 1854; and was survived by four sons and two daughters.

The Month.

Parties as Witnesses in Breach of Promise Cases.—Before it is resolved to extend to Scotland the law recently enacted in England admitting evidence of this suspicious character, we are quite ready to hear what our neighbours have to say as to the working of the new rule. We learn that at Stafford Baron Martin expressed a strong opinion as to the inexpediency of the recent change. In the case before him the plaintiff, a pretty housemaid in a farmer's house, swore that her master's son once told her he would marry her when his father died. Two other witnesses saw him twice with his arm round her waist, and once she was sitting on his knee. In cross-examination, the plaintiff admitted that other men about the place had kissed her often, and that she had "in fun" consulted an attorney about bringing an action against one of those other lovers for breach of promise of marriage. The jury, on the unsupported testimony of the girl as to the promise, gave her £200 of damages! The case is triumphantly adduced by the opponents of the change as showing that in such cases the admission of all possible evidence does not conduce to the more sure

ascertainment of the truth, because the temptations to perjury are irresistible. In regard to another case, the *Law Times* says:—

"At Stafford Assizes, a middle-aged widow, called Eliza Haycocks, sued Mr Wm. Biahon, a retired manufacturer, for breach of promise of marriage. It was quite the case of *Bardell v. Pickwick*. She was a tenant of his, and she swore that he had put his arm round her waist, kissed her, and promised her marriage. Fortunately for the defendant, the plaintiff was neither young nor pretty, and therefore did not, as in the case commented upon last week, excite the sympathy of soft-hearted and soft-headed jurymen, and for once justice was done in this form of action, and a verdict found for the defendant, the jury stating that 'they were convinced that there had been a conspiracy between the plaintiff and her sister.' We notice it, however, for the purpose of again directing attention to the moral which Baron Martin, by whom it was tried, so sensibly drew from it. He said, 'it was just the sort of case which he had fully expected would arise out of the new Act empowering parties to actions of this kind to give evidence on their own behalf. He was convinced that many such actions would be brought. Twenty years ago the subject of allowing plaintiffs and defendants to be examined in their own cases was fully discussed, and actions of this kind were then specially and very wisely excepted.' Nor was this the only testimony against the new practice. Mr Huddleston, Q.C., who was in the case, said that 'he had voted for the alteration of the law, but he had already seen that he had made a great mistake in doing so.' With such weight of authority against it, and seeing what mischiefs may come of it even in another year, some competent member should move for its repeal."

We decline to accept these instances, or even the high authority of Baron Martin, as sufficient grounds for condemning the new law, and reverting to the old system of exclusion. We trust that all juries will not prove so stupid or so partial; and in Scotland, at least, the public are quite prepared, if they show similar weakness, to take away the decision of such cases from the jury box, and confide it to the hardened lawyers who occupy the bench. In these times we can hardly conceive the possibility of a return to the old plan of excluding questionable or biassed evidence, instead of hearing it and weighing it. We hope that the time is not far distant, at least in Scotland, when the intelligence of the average jurymen will have reached a high enough level to enable him to attach different degrees of credibility to the testimony of a pretty pursuer in an action for breach of promise against a moneyed man, and that of a disinterested bystander.

The Land Tenure Bill.—We do not think that any good end would be served by discussing the details of this measure until an amended bill has been laid before Parliament. We regret that this has not been done before our present issue. The ample consideration, however, which the bill has received in all parts of the country has made it very plain that the principle of the bill is generally approved, while almost every clause of it is condemned in terms more or less severe. There is some difficulty in understanding how so large and general a condemnation should be passed on a measure, the principle of which is approved, as well as in discovering what that principle is. But we apprehend that the only principle capable of being carried out with due regard to the rights of property is, that heirs and purchasers of estates in land shall hold them absolutely, without the necessity of

entering with a superior, and paying a large sum of lawyer's fees to his agent. So far as the legal rights of superiors are affected by the bill—and they are very seriously affected—it is evidently just that the remodelled bill must either save these rights, or provide some means of giving compensation. Probably the Lord Advocate took the wisest way of ascertaining the state of public opinion, and evoking general discussion, when he chose to lay on the table of the House of Commons, not a carefully digested bill, ready to be passed into law, but a draft presenting the general lines of a great policy, leaving details to be adjusted when the country had approved of the policy. It is clear that the Lord Advocate has got far more help from the profession and the country in framing the clauses of the Bill that will eventually pass, and that he will trace out with less trouble and with a firmer hand the future law of land tenure, than if he had at first evolved it entirely out of his own consciousness.

Besides the necessity of preserving the superior's estate in the land, which public criticism has made apparent, a modification will be required of the proposed new law of prescription. Seven years is too short, and perhaps twenty years is the most suitable period. It will save future litigation if the Act shall declare how far this law is to have retrospective effect. Upon principle it appears proper that, where a period of prescription is current at the passing of the Act, a person acquiring under the new and shorter period of prescription, should be allowed to reckon only from the date of the law introducing it; but he ought also to have the option of availing himself of the old law, which may give him a greater advantage; for the Legislature, in abridging the term, certainly does not intend to place persons delaying to assert their rights in a more favourable position than they held under the former law. See on this subject Savigny's *Conflict of Laws*, p. 313 (Engl. Transl. 1869; *System*, viii. 431).

The abolition of the law of deathbed, the vesting of heritable estate without service, the abolition of the law of conquest in succession, and other improvements, have either been so often advocated in these pages, or are so obviously expedient, that it is superfluous to enlarge upon them at present.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT, LANARKSHIRE, GLASGOW.—Sheriffs BELL and CLARK.

MANDERSON v. MANDERSON.

Parent and Child—Aliment.—This was an action in which a mother sued one of her sons for aliment. The pursuer's husband had deserted her eight years ago, and she had not since heard of him. It was stated, as a preliminary defence, (1) that her husband was alive and in Scotland; (2)

that the pursuer having other children, all parties were not called. The defender, being appointed to state, by minute, in what part of Scotland the pursuer's husband was to be found, failed to do so. The following interlocutors were then pronounced:—

Glasgow, 21st January, 1870.—Having heard parties' procurators and made avizandum, in respect the defender has failed to obtemper the interlocutor of 26th November, 1869, repels the second preliminary plea in law in so far as it applies to the non-citation of the pursuer's husband, but in respect the pursuer has not made her remaining children parties to the process, sustains said plea in law to the effect that all parties are not called to the action, and dismisses the same, but in the circumstances finds no expenses due by, or to, either party, and decerns.

Note.—It was not denied at debate that the pursuer had other children alive and able to contribute to her maintenance. It was even averred that they were contributing to her support. In these circumstances, the Sheriff-Substitute is of opinion that the present defender is entitled to have them made parties to the action, as otherwise the apportionment of liability against each could not be ascertained, and his claim of relief might be seriously affected. In special circumstances this rule of requiring all liable in contribution to be called may admit of relaxation, but no such circumstances were stated in the present case.

Glasgow, 10th March, 1870.—Having heard parties' procurators, and reviewed the process, finds that it was admitted by the pursuer at the debate before the Sheriff that she had three other children besides the defender—two daughters and one son; but it was at the same time stated that she had no claim against any of the said three, in respect either of their inability to pay aliment, or of their contributing voluntarily as much as they were able to do; Finds that the obligation upon children to aliment a destitute parent is a joint and several obligation, and when that is the case the creditor is entitled to proceed against any one of the obligants to the amount of his liability; Finds that it would be an extreme hardship on the pursuer to force her to call, as joint defenders, parties against whom she admits that she cannot competently conclude, and there is no authority for holding that she is bound to do so; therefore, but under reservation of the defender's right to shew, as a defence upon the merits, that the burden of alimentering the pursuer has either been undertaken entirely by his brother and sisters, or that they, at least, are able to take a share of it, recalls the Sheriff-Substitute's interlocutor of 21st January last, in so far as it sustains the second preliminary plea, and dismisses the action; repels said plea, but *quoad ultra* adheres and remits to the Sheriff-Substitute to proceed farther with the cause as to him may seem just.

Act.—Richard Brown.—*Alt.*—W. B. Faulds.

SHERIFF COURT OF BUTESHIRE.—Sheriffs HUNTER and ORR.

NICOL v. M'MILLAN.

Illegitimate child—Aliment after seven years—Discharge—Custody—Offer by father.—The circumstances of this case are fully explained in the following interlocutors and notes:—

Ruthven, 18th May, 1869.—The Sheriff-Substitute having made avizan-

dum with the whole cause, Finds it admitted that the defender is the father of a child to which the pursuer gave birth on or about the seventh day of December, eighteen hundred and fifty-seven: That by decree of Court he was found liable to aliment and support that child until it reached the age of seven years; and that he duly implemented that decree: Finds, that the term prescribed by the said decree ended on or about the seventh day of December, eighteen hundred and sixty-four: Finds that the pursuer now sues the defender for the aliment of that child from that date until he shall attain the age of fourteen years complete, or be able to support himself: Finds that the defender denies his liability on various grounds, and, *inter alia*, because of a receipt bearing date the 8th December, 1864, produced and founded on by him in these words:—"Lamlash, Isle of Arran, 8th Dec., 1864.—Received from Mr Alexander M'Millan, Auchincrain, the sum of two pounds ten shillings sterling, being the last payment due to me for the upbringing of your illegitimate child, and which I give you a final discharge of all claims and accounts. (Signed) Janet Nicol. William Munro, witness; Alex. M'Kenzie, witness." Finds that the defender alleges that that receipt is a discharge of all the pursuer's claims and accounts for bringing up the said child, and pleads that in consequence she has now no claim against him for the sum sued for: Finds, for the reasons stated in the note hereto annexed, that that receipt does not import a discharge of the pursuer's present claim. Therefore allows both parties a proof of their respective averments, and to the pursuer a conjunct probation, and appoints the case to be enrolled for the purpose of fixing a diet of proof.

Note.—The plea founded on the receipt above quoted, produced by the defender, is, although not stated as such, a preliminary plea, and falls to be dealt with accordingly. The concluding words of the receipt, "I give you a final discharge of all claims and accounts," taken by themselves, are certainly comprehensive. Taken in connection with the context, so far as they can be, or have any meaning at all, they appear to have but a limited application. They are connected with the receipt by the words "and which." The defender interpolates the word "of" betwixt those two words. Perhaps that was intended. It is not expressed. Assuming "of" to be the missing word, the question arises,—What is the antecedent to the pronoun which? According to all the ordinary rules of grammatical construction, it appears to be the word "payment," described as "the last payment due to me for the upbringing of your illegitimate child." It would be a straining of the sentence to convert the words "the upbringing" into a noun, and to hold that the discharging words applied to them as the antecedent words which seem to be introduced only for the purpose of defining what kind of last payment was being made. According to the admissions of parties, it so happens that a decree granted against the defender for the upbringing of his illegitimate child, expired on the day before the date of the receipt in question. The payment then made was the last under that decree, hence it is a fair interpretation of the pursuer's intention, at least (whatever may have been the defender's) that in granting her receipt for the last payment due to her, and of which she gives a final discharge of all claims and accounts, she had in view that decree, and was merely receipting or discharging all claims and accounts due to her under it. Nor is this interpretation the less reasonable when it is kept in view that the pursuer is, judging from her signature, not a literate person.

The pursuer contends that the document in question, as a discharge, required the solemnities prescribed by the Act 1681, c. 5, and being destitute thereof, could not be pleaded by the defender. It is not necessary to dispose of this contention, the wording of the document being deemed, as already enunciated, fatal to its use as a discharge of the pursuer's claim.

Rothsay, 15th November, 1869.—The Sheriff-Substitute having resumed consideration of the whole cause, together with the productions and notes of evidence, Finds it admitted that since the 7th day of December, 1864, the defender has not contributed towards the maintenance of the pursuer's illegitimate child, of which he is the putative father: Finds it proved that about that time the defender intimated to the pursuer that he would no longer pay her aliment for their child, but would receive him into his own family, and bring him up with his legitimate children: Finds it not proved that he at that time, nor previous to the month of June, 1865, made any real effort to obtain the custody of the child, nor that the pursuer refused to give him up to the defender: Finds it proved that on the 13th, 14th, and 15th June, 1865, the pursuer took the child to the defender's house and left him there, but that on each occasion he ran off: Finds it not proved that the defender on any of these occasions made any effort to retain the custody of the child, or after he had run away made any inquiry after him, or any attempt to recover him and bring him back: Finds it proved that previous to that time the child had been strong and healthy, but that immediately thereafter he became sickly and afflicted with nervous and fainting fits, and has continued in that state till very recently: Finds that he is now in a stronger and more healthy physical state, and being nearly twelve years of age, might undertake light work: Finds in law that the defender, by the said offer, and his subsequent conduct, has not discharged his obligations to maintain the pursuer's child: Finds that since the child fell into bad health, and so long as he continued therein, the pursuer was entitled to his custody: Finds that the defender is now entitled to the custody of the child, and that the pursuer is bound to deliver him up forthwith to the defender: Finds the defender liable to the pursuer for the expense of maintaining her child from the 7th of December, 1864, till the date of this interlocutor: Finds that the sum of £6 sterling per annum is a reasonable sum for his maintenance, and that the same ought to have been paid quarterly, and in advance to her: Finds the defender liable to her in interest at the rate of five per cent. per annum on each quarter's payment, from the time the same fell due: Finds him also liable to her in the expenses of process, appoints an account thereof to be given in, and remits the same to the auditor of Court to tax and to report, and decerns.

Note.—This is an action as more specifically set forth in a preceding interlocutor, at the instance of the mother of an illegitimate child against his putative father, for aliment since he reached the age of seven years until he attain that of fourteen or be able to maintain himself.

The defence is twofold,—*First*, that the pursuer granted a discharge of all claims and accounts for the upbringing of that child; and *Second*, that he, on the 7th December, 1864, and 4th December, 1865, applied to her for the custody of the child, and offered to receive him into his own family, but that she refused these offers, although he had intimated that he would no longer give her any aliment for the child.

The first of these defences being of a preliminary nature, has been already

disposed of, and the second falls now to be considered. The pursuer's answer to it is also twofold, viz.—*First*, that she never refused to give up her child to the defender, and that she has frequently without success desired the defender to take charge of the child, and that on the 13th, 14th, and 15th June, 1865, she took him no fewer than five times (the child says seven times) to the defender's house and left him there; and, *second*, that since that date the child's health has been such as to entitle her to his custody.

The specific occasions rested upon by the defender, as those on which he offered to take, and the pursuer refused to part with the child, were, he alleges, on 7th December, 1864, and 4th December, 1865. The first of these alone it seems requisite to notice, as the child is alleged, and in the preceding interlocutor it has been found, that he fell into bad health months anterior to the second of those dates.

The defender depones that on 7th December, 1864—so also does the witness, John Fullarton, who was with him—they went to the pursuer's house for the child, and that the defender said he would pay no more for its support. They also say that the child was not then in the house, and that his mother, when asked where he was, said she did not know, and told them to go and get him. The defender says, "I do not remember whether the pursuer said she was willing that I would take him" (the child). Fullarton is not asked, and is silent upon that point, but he says the pursuer said, when defender said he had come for his boy, "You can go and get him." The pursuer's account of the same occurrence is, "I said I was willing to let him have him; he refused to look for the child." It does not appear that either the defender or Fullarton made any effort to look for the child, and it is not alleged that the pursuer had received previous intimation that the defender was coming for the child that day. It is a remarkable fact, that while the defender estimates the distance betwixt his house and the pursuer's "as not a quarter of a mile off," and it seemed that the pursuer was living there till shortly before the month of June, 1865, he never once went back to her house or sent any one for the child; and M'Kirdy's house, where she and the child were staying in June, 1865, is said to be only about a mile from the defender's house, yet he never once went there, at least until long after the pursuer delivered the child to him in that month. Throughout, the defender's conduct, as disclosed by the evidence, has been most apathetic and unenergetic for one who was really in earnest when he offered to take the child under his own charge. It would almost seem that he was actuated by the motive which Mrs M'Neil says a man sent by him for the child said he was, viz., "it appears to me that the father is not wanting the boy," or as if he had relied on the complete efficacy of the discharge pleaded by him in bar of this action. He was bound to make it quite clear that he meant to carry out his offer, and that it was not illusory. Such is the doctrine deducible from the following cases, viz., *Wilson v. Borrie*, 16th June, 1810, p. 426; *Corrie v. Adair*, 24th February, 1860; and from *Reid v. Robertson*, 7th November, 1868, not reported in the Session Cases, but in the *Journal of Jurisprudence*, vol. xii., p. 717, where Lord Deas is reported to have said, "The father was bound to make it clear," that an offer made in such a case as the present, "was a *bona fide* offer, and that he had made provision for its support; that it was not a mere threat." Notice may be taken of a conversation said by the defender and William Monro to have taken place on

the 8th of December, 1864, at the time when the discharge was signed. (This occurrence is not referred to in the record). They concur that the pursuer said to the defender, "He (the defender) would not get her boy," in reply to an observation by the defender, that he required a boy for herding, and that her child would be of service to him, as he paid a herd £1 in the year, and he would save him that expense. But really that was more of the nature of a casual remark than an offer to take the child. Hence her reply, though not encouraging, must be regarded as rather an objection to her boy being put to such a use, than a refusal by her to part with him.

It may be said that there was equal apathy and indifference on the part of the pursuer. It is quite true that she might have tested the sincerity of the defender's offer sooner than she did; but it is clear, that in the month of June, 1865, she was at considerable pains to evince her anxiety, practically, to avail herself of it. Accordingly, twice upon the 13th, twice upon the 14th, and once upon the 15th days of that month, she takes the boy to the defender's house, and leaves him there. On each of those occasions the boy invariably and at once ran away. The defender seems to have acted as he declared he would to the pursuer on the first of those occasions, viz., "that he would not force the boy in," and to Alexander M'Kirdy, "that he was not going to force the boy to stay." He neither puts himself to any trouble in detaining him, nor makes any inquiry after him, nor does he attempt to get him into his custody again, and yet there is only a mile betwixt his residence and hers. The child seems to have thought that his mother was in earnest in wishing him to stay with his father, and must have apprehended the "lathering" which she says she threatened him with if he came back, and which Catherine Currie also speaks of as having over-heard him promised by her, as he keeps away from her house until two in the morning, and is afraid to face her.

A new element occurs in the case at this time. The boy, although up to that date a strong and healthy child, immediately after running away from the defender's house, becomes seriously unwell. It is to be regretted that there are no medical certificates bearing upon the child's state of health; but no one can read the evidence without being satisfied that he became subject to most alarming nervous fainting fits (he was by one of the witnesses on one of these occasions supposed to be dead), and that till recently he has been subject to them. Without detailing the evidence on this point, reference may be made to the pursuer's (pp. 16-18), to Alexander M'Kirdy's (pp. 25-28), to Catherine M'Kirdy's (pp. 29, 30), to Mrs M'Neil's (p. 49), to Euphemia Ferguson's, or Hamilton's (p. 37), and to the child's own statement (p. 22). If that illness was the consequence of the defender's treatment of the child when he was left with him; and his story be true, that "the defender lathered me on the hand, and was holding and squeezing me the whole time," he was in his power—a story which, although contradicted by the defender, was repeated *de recenti* to Alexander and Catherine M'Kirdy—such *sævitia* would amply justify the pursuer in thereafter refusing to return the boy to his custody. One thing is certain, that from whatever cause it has arisen, the boy gave the most unmistakable signs of abject terror of, and shrinking aversion from, the defender in the presence of the Sheriff-Substitute immediately after giving his evidence, when a proposal was made that he should be then and there handed over to his father. But the illness of the child being incontest-

ably established, upon the authority of *Pott v. Pott*, 7th December, 1833, and of *Andersm*, 11th March, 1848, fully warranted the pursuer in refusing, so long as it supervened, to part with the custody of her child.

The child being now much stronger, and having continued free from those nervous fits for the last four or five months, and being, according to the opinion of the pursuer's own medical witness, though "not physically strong, able to do light work if well fed and attended to," there is no good reason why the defender should be refused the use of such services as he is fit for, in return for his maintenance under his father's roof.

The proof has not disclosed that the defender's circumstances are materially better than at the time when he was originally found liable to maintain the child, nor that the pursuer has been really subjected to any extraordinary expenses on account of the maintenance of her child. Accordingly the same rate of aliment, viz., £6 per annum, as formerly awarded, has been held to be in the circumstances reasonable.

Edinburgh, 23d February, 1870.—The Sheriff having considered the reclaiming petition for the pursuer, with the answers thereto for the defender, and the reclaiming petition for the defender, with the answers thereto for the pursuer, closed record, condescendence of *res noviter veniens*, proof, productions, and whole process, in respect of the reasons stated in the note hereto annexed, affirms the interlocutor of the 22d of September, 1869, appealed from, and dismisses the appeal, appoints the condescendence of *res noviter veniens* to be withdrawn from the process, and the relative entry to be deleted from the inventory of the process by marking the word "delete" opposite to the entry on the margin; but appoints the Clerk of Court to preserve the said condescendence in the archives of the Court; also affirms the interlocutor of 15th November, 1869, and the interlocutors previously pronounced in the case, and dismisses the appeals, and remits the cause to the Sheriff-Substitute to proceed therein in common form, and as to him shall seem just.

Note.—There are under these appeals three points which require consideration, and in none of which the Sheriff has seen reason to disturb the interlocutors appealed against. The first point relates to the allegation of *res noviter veniens*; the second to the interlocutor refusing to sustain the defence of a discharge by the pursuer; and the third to what may be styled the merits of the case.

I. It is obvious that the allegation *res noviter veniens* cannot be received and admitted to proof. The allegation is merely a repetition of matter which substantially is embodied in the record, and which pervades the proof. To adduce evidence of it would be mere surplusage, and could no-wise strengthen the pursuer's case. If competent, it would be anomalous and unprecedented to allow evidence to be adduced of *res gestæ*, which occurred during the proof, and consequently in presence of the Judge-examinator. He must have been cognizant of what passed, and it devolved on him, if he thought it worthy of notice, to take notice of it. The Sheriff-Substitute has accordingly done so here, for in the note to his interlocutor dealing with the proof, he says that "the boy gave the most unmistakable signs of abject terror and shrinking aversion from the defender in the presence of the Sheriff-Substitute immediately after giving his evidence, when a proposal was made that he should be then and there handed over to his father." It might perhaps have been more technical if this had been stated in a note on the proof itself, but the statement of it in the note to the

interlocutor is sufficient, as it brings the fact under the notice of the Judge of appeal, which is all that the pursuer can desire.

II. The defence of non-liability rested on the alleged discharge is untenable.

The document was prepared by the instructions of the defender, and, therefore, if it is an unintelligible, ambiguous, or defective one, it must, according to settled law, be read and construed against the defender. The first part of it is sufficiently plain and valid, but the latter of it, on what the defence rests, is devoid of meaning, and does not admit of construction. If, then, the document can be construed, the Sheriff would concur in the construction put upon it by the Sheriff-Substitute. If, as maintained by the defender, it is a discharge not only of claims previous to its date, but of all prospective claims, and consequently of the subject matter of the action, it must contain clear and express words so purporting. A discharge of prospective claims is never implied, but must be stated in explicit terms, and it embodies no such terms.

Independently of this objection, the receipt when compared with the proof is a suspicious document; *first*, from inspection, it might be deemed that the two last lines were an addition, having been written after the stamp was put on; the distance between the four first lines being different, and otherwise indicating interpolation; *second*, there is a signature purporting to be that of the pursuer's. The pursuer depones that she put her hand to the paper and made a mark, but did not write her name, and in the conclusion of her deposition, she depones that she cannot write, and accordingly there is no signature. On the other hand, the witness, Monro, states that she signed the receipt in his presence. The signature, "Janet Nicol," though not well written, is apparently that of a person accustomed to the use of the pen, and who writes a current hand, which it would be contrary to all probability that the pursuer can do.

III. On what may be styled the merits there is considerable difficulty; but after full consideration, the Sheriff has arrived at the same result as the Sheriff-Substitute did. It is an embarrassing alternative, whether to allow the boy to remain with his mother, and compel his father to aliment him, or to transfer him to the custody of his father. But, on the whole, the latter must be deemed to be more for the advantage of the boy, which is the matter for determination. The boy's mother is a woman of very inferior condition, having no fixed residence, and unable, even with the aid of the aliment, to give the boy the sustenance and care which the state of his health demands. Training of any description would be unattainable. The rule of law is fixed that the defender is entitled to have him transferred to him on two conditions, *first*, that his offer to bring him up in his own family has been made *bona fide*; and *secondly*, that the boy's residence with him will not be injurious to the boy's health. What does or does not amount to absolute *bona fides*, is a question which is always difficult to decide; but here there is *bona fides* sufficient to warrant the transference. The defender, indeed, may not be anxious to have the boy in his house, but it does not therefore follow that his offer is not made *bona fide*; and the defender is entitled to the presumption that it is so. The boy is recovering from the nervous affection, by whatever caused, which for a time had impaired his health. He will have sufficient sustenance, and a fixed residence. If his father and his father's wife possess ordinary human feelings, neither of them will deliberately use him ill. He will have.

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The defender might have appealed against the above interlocutor within eight days from its date. Instead of doing so, he took out a sist, for the purpose of having the interlocutor recalled, and another diet fixed for the trial. At the calling of the sist, the pursuer's agent objected to its competency. The Steward-Substitute has sustained the objections. The following are the observations he made on delivering judgment on the 4th inst. :—

The competency of the sist, which the defender has taken out, depends upon his showing that the interlocutor of 23d December last, whereby he was decerned against for the sum sued for (subject to a trifling deduction), with £2 11s. 9d. of expenses, was a "*decree in absence*" in the sense of the Debts Recovery Act.

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debt practice does not carry us far; because, not only is the point still an open one, but the *rationale*, upon which the practice, assuming that it is agreeable to the statute, is supported, does not require the term "decree in absence" to be read in sect. 16 in any but its ordinary legal meaning.

But, when we turn to the Debts Recovery Act, the unsoundness of the defender's contention at once appears. Not only is the Debts Recovery Court a Court of Record, the Sheriff being required at the first diet to take a note of the pleas of parties, which is to form part of the process, so that it can always be ascertained with absolute certainty whether *litis-contestation* has taken place, or, to use an expression employed in the Act itself, whether there is a "contested cause;" but the very case of a decree by default seems to be provided for. Such a decree is, beyond all question, a decree finally disposing of the merits of the cause. It may, therefore, be appealed to the Sheriff, who is expressly authorised, "if it shall seem proper to him," to "order the case to be released" (sect. 11). I can only account for the defender's failure to avail himself of this easy remedy by supposing that he overlooked the provision above referred to.

Though what I have just said is sufficient for the decision which I am about to pronounce, I may, before concluding, advert to two matters, which seem to me to illustrate on the one hand the policy of the rule which I have extracted from the statute, and, on the other hand, the dangerous, not to say absurd consequences which would flow from the adoption of the defender's contention.

I. If the defender be right in his contention, he would be entitled to demand a rehearing, however gross and inexcusable the default of which he has been guilty; because, under sect. 16 of the Small Debt Act, and sect. 7 of the Debts Recovery Act, the Judge has no power to inquire into anything except whether the decree be a decree in absence. If it be so, he must repon the party. But is not this most inequitable? Is it not treating default far more leniently in this Court than it is treated in any other Court? Is it not far more consistent with sound policy and justice to say to the defender—"No, you can go to the Sheriff, who will judge of your default, and, according to the view which he takes of it, will either repon you on such conditions as may seem proper, or will refuse to repon you." In the Sheriff's ordinary Court, a party is not reponed against a decree by default, as a thing of course; but it is always a matter of discretion with the Judge to whom the application is made—see, per Lord Justice Clerk, (Inglist), in *Arthur v. —*, 16th June, 1866; 38 Jur. 440. Why should a different rule be established in the Debts Recovery Court?

But, again, see what a formidable engine of delay would be put into the hands of parties if the defender's contention were adopted. Suppose, by way of illustration, I were to hold this *sist* competent, I should have to fix a day for the trial of the cause, as I cannot proceed with it to-day, it being expressly provided in the Debts Recovery Act (sect. 7), varying so far from the Small Debt Act, that the warrant for the *sist* shall not contain a warrant for citing witnesses and havers. But, suppose that on the day so fixed, the defender does not appear, and decree is again given against him, there would, assuming his present argument to be sound, be nothing to hinder him from taking out another *sist*, and the thing might go on in that way for ever.

II. The other matter to which I wished to call attention is suggested by the provisions in sect. 18 of the statute as to the fees of procurators.

As a matter of fact, the sum of 30s., being the fee exigible in a "contested cause" of the value of the present action, was allowed to the pursuer's agent in the interlocutor of 23d December. But, if the defender's view is right, a fee of 7s. 6d. was all that the pursuer's agent was entitled to claim, or the Judge was entitled to allow. I cannot think that the legislature intended anything of the kind. The pursuer's agent had the trouble of preparing for the trial, precognosing witnesses, and attending on the day fixed; and, though in the present instance, this trouble may not have been very great, still it might have been so, and the principle is all the same; and such services as those I have mentioned were not, I apprehend, intended to be covered by the charge of 7s. 6d. allowed for all services necessary in obtaining a "decree in absence."

But, here again, let the defender's view, that a decree by default is to be treated in all respects as a decree in absence, be pushed to its legitimate consequences, and its injustice—I had almost said absurdity—will be plain. Suppose that a trial in the Debts Recovery Court was adjourned at the close of the pursuer's proof, and suppose, further, either that the defender were satisfied, after hearing that proof, of his inability to resist decree, or that the pursuer were satisfied that he had failed to make out his case, the defender in the one case, and the pursuer in the other, would be able, if the defender's theory be sound, to save himself from a considerable sum of costs, by the simple expedient of not putting in an appearance at the adjourned diet! The proposition will hardly bear enunciation.

While the opinion, which I have thus announced and endeavoured to explain, has been formed independently, it is satisfactory to me to know that a similar ruling has been given in the Sheriff Court of Glasgow.

Defender's sist was accordingly held incompetent.

Act.—Robert Broatch, Solicitor, Dalbeattie.—Alt.—R. Hewat, Solicitor, Castle-Douglas.

STEWART COURT, KIRKCUDBRIGHT.—*Sheriffs Hector and Cheyne.*

HEUGHAM v. MURRAY.

Master and Servant—Dismissal—Warning.—Pursuer sued defr. for value of services rendered on his farm of Holm of Almorness in Buittle. Having been in his service for the year from 10th January, 1868, to 10th January, 1869, and having entered upon a second year's service and remained in it down to 5th February, 1869, when he was told he might go, as he was of no further use, without any previous warning, and being likewise unable to get a final settlement of what he considered he was entitled to for the time he did work, the pursuer brought an action in the Debts Recovery Court for (1) £18, being the year's wages wrought for; (2) £18, for the second year, in consequence of said dismissal without warning; and (3) board wages from 5th Feb., 1869, to 10th Jan., 1870, under deduction of £5 paid in October, 1868, and £4 paid on 5th Feb., 1869. Defr. alleged the money he had given was as much as he was bound to pay, and denied that he was due anything except £1, which he offered to pay for a discharge. The following are the judgments given:—

Kirkcudbright, 20th Dec., 1869.—Having advised the process, Finds that the pursuer worked upon the defender's farm from 13th January, 1868, to 5th February, 1869, with the exception of a week in October, 1868; Finds

that the pursuer has failed to establish an engagement of him by the defender as a yearly servant in husbandry, but on the contrary depones himself that he was engaged for two or three months, and that after the expiry of the first three months he might have gone away at any time; Finds that no special agreement was made as to pursuer's wages, but that, in the circumstances, ten pounds, with food and lodging, was a fair and reasonable remuneration for the services rendered by him; Finds that the defender, besides giving the pursuer food and lodging, paid him sums of money, amounting to £9, and tendered to him, prior to the raising of this action, another pound, which was refused; and with reference to the foregoing findings, decerns against the defender for the sum of one pound sterling as the balance of wages due by him to the pursuer; *Quoad ultra*, assoilizes the defender from the conclusions of the summons, and finds him entitled to £4 2s of expenses, and decerns.

Note.—The pursuer's claim is brought on the footing that his engagement as farm servant to the defender was for the period of a year; and he maintains that, in the absence of a specific agreement on the subject, such a duration must be presumed. While fully acceding that there is a presumption to that effect where a farm servant is engaged at the term without the period of the service being named, the S. S. is not satisfied that the same presumption applies where, as here, the engagement is made between terms, in which case he rather thinks that the next term would be held the limit; but assuming the presumption to apply, it is in the view of the S. S. completely rebutted in this case by the evidence given by the pursuer himself, which clearly shows that he did not understand or consider himself to be engaged by the year, or to be entitled to warning as a yearly servant. In its origin, according to his own account, the engagement was for two or three months, and though he remained for rather more than a year, he tells us that when the first three months were expired he might have left at any time. Nay, further, he states that the defender asked him in October, 1868, to undertake the next winter's ploughing, though no bargain was then made between them. But what was the use of a new engagement, if the pursuer's engagement did not expire, as he says in his summons it did not, till 10th January, 1869? Such being in the opinion of the Steward-Substitute the result of the pursuer's own evidence, it is unnecessary to advert to that of the defender, which is entirely confirmatory. The pursuer is, however, entitled to remuneration for the services which he rendered to the defender, and, no rate having been mutually agreed on, the question under this branch of the case is what is a fair and reasonable allowance in the circumstances? The pursuer claims wages at the rate of £18 per annum, which is about 1s a day, and it is proved that he was paid at that rate by the person for whom he worked for some weeks after he left the defender, and that he receives the same from his present employer, though the latter, it should be remarked, does not supply him with lodgings. It also appears that for the two years previous to Martinmas, 1867, he had been paid at the rate of £12 per annum, in addition to his food and lodging. On the other hand, it is reasonably proved that his health was not, during a part at least of his stay with the defender, such as to admit of his doing an ordinary man's work; and, taking the circumstances into consideration, the S. S. has come to be of opinion that £10 with food and lodging would be an adequate remuneration. It is admitted that £9 was paid by the defender, so that £1 is all that now remains due. As, however, this sum was tendered to the

pursuer prior to the institution of the action, the defender is entitled to full expenses.

The pursuer appealed. The Sheriff pronounced the following interlocutor:

Edinburgh, 28th Dec., 1869.—The Sheriff having considered the judgment of the S. S. appealed against, and the proof and process, sustains the appeal and alters the judgment; Finds on the proof, in fact, that the pursuer was in the service of the defender, a farmer, from 13th January, 1868, to 5th February, 1869, and performed services and work of various kinds for the defender during the said period; Finds that the defender took the pursuer into his said service, and continued him therein, without making any special agreement regarding the rate of wages, or the duration of the service; Finds that the defender furnished food and lodging to the pursuer during his service; Finds that for such work and services as the pursuer performed for the defender, fifteen pounds became claimable by the pursuer as just and reasonable money wages, or remuneration besides his said board and lodging; Finds that after deducting two sums, amounting together to £9 paid by the defender to account, there remains due and payable by him a balance of six pounds; Finds that payment of this balance was never tendered by the defender; Finds, on the other hand, that this action embraced conclusions to an unwarranted extent, and in excess of the just claims of the pursuer; and that expenses of process are not due to him except subject to modification; Finds, in law, that the pursuer is entitled to decree for the said balance of six pounds; and also for two pounds ten shillings of modified expenses, and decerns against the defender accordingly. *Quoad ultra* assoilzies him from the action, and decerns.

Note.—As regards the *amount* of wages, the Sheriff finds himself unable to concur in the views of the S. S. No doubt the defender, as a witness, depones that the pursuer was occasionally unwell, and not able to do an ordinary man's work. But on cross-examination he admits that "the pursuer was only *one day* entirely off work with me;" and again, "the pursuer was constantly occupied, when with me." Mr Hyslop, the tenant of Burnside farm, in whose service the pursuer was for some time, after he left the defender, depones that he put the pursuer to any kind of work to be done on a farm; that the pursuer was a useful servant; that he paid him a shilling a day in addition to his food. "I thought his charge of 1s a day very moderate: if he had asked more I would have given him more;" that he would not have grudged him 1s a day all the year round and his food.

On the whole, the Sheriff cannot reconcile with the evidence and the justice of the case a smaller estimate of the pursuer's services than that embodied in the interlocutor now pronounced.

Act.—*R. Broatch, Dalbeattie.*—*Alk.*—*R. Hewat, Castle-Douglas.*

STEWART COURT, KIRKCUDBRIGHT—Sheriffs HECTOR, DUNBAR, CHEYNE, and JOHNSTONE.

ROWAN v. M'KIE.—April 27.

Sheriff—Process—Sheriff Court Act 1853—Protestation—Parent and child.—Action of filiation and aliment. The summons was executed on 12th October, 1869, and appearance was entered. Pursuer failed to call the action, and on 29th October defr. obtained protestation, with 7s. 6d. of protestation money. Defr. did not extract the protestation. Pursuer, without

paying the protestation money, enrolled and called the action. Defr. objected to the action being proceeded with till the protestation money was paid. Pursuer declined to pay it, and on 12th November, 1869, raised and executed a new summons. Defr. pleaded, *inter alia*, to this new action that there was a *lis pendens*.

The S. S. pronounced this interlocutor:—

Kirkcudbright, 30th November, 1869.—Having heard parties' procurators on the closed record, Finds that the grounds of action are relevantly set forth in the summons: Repels the defence founded on the alleged defective specification as regards the date of the intercourse between the pursuer and defr. in the Castle Douglas Hotel founded on in the libel: Finds it alleged in defence, and not disputed, that a summons *verbatim* similar to the present was raised and served on the defender on 12th October last; that the defender duly entered appearance, and on 29th October last moved for and obtained decree of protestation against the pursuer for not insisting in the action, which decree has not yet been extracted: Finds that the instance in said action not having fallen, the pursuer is entitled, under the 27th section of the Act of Sederunt, 10th July, 1839, to enrol and proceed in the action on payment to the defender, as his procurator, of the sum of protestation money awarded: Finds that while the said action was in dependence, the present action, with the same conclusions and *media concludendi*, and between the same parties, was raised on the 9th December, 1869: Finds, in these circumstances, that the defence of *lis pendens* pleaded against the present action applies: Sustains said defence of *lis pendens* Dismisses the action: Finds the defr. entitled to expenses as the same shall be taxed by the auditor of this Court, to whom remits the account of said expenses, when lodged, for taxation, and decerns.

Note.—If it appeared to the pursuer's procurator advisable not to proceed with the original action, it was in his power, on payment of the protestation money, to enrol the cause and abandon the suit, on payment of expenses, or obtain decree of dismissal on the same conditions. But while that action has neither been abandoned nor dismissed, and protestation has not been extracted, it is as much a depending process as that which has now been dismissed.

The Sheriff, on appeal, dismisses the appeal, and affirms the interlocutor, adding this

Note.—If the pursuer meant to dispute the *facts* alleged in support of the defence of *lis alibi pendens*, it was within her power to do so in a reclaiming petition. But she has lodged no petition nor craved an oral hearing, but has expressly dispensed with both. Holding therefore the facts admitted, including the fact that the protestation has not been extracted, the Sheriff considers the interlocutor appealed against in accordance with the provisions of the Act of Sederunt.

The expenses were thereafter taxed and decerned for. The pursuer then enrolled the first action. At the calling the defender minuted a defence on the summons, upon which the record was closed, and parties heard upon the following preliminary defences:—

1. Action has fallen and cannot be renewed, in respect of the delay in proceeding between the service and the calling on the date hereof.
2. Protestation was obtained herein, on 29th October last, with 7a. 6d. of protestation money. The protestation money not having been paid, and

not even paid yet, the defr.'s agent, on 30th December last, ordered extract of the protestation. Sometime after, but on the same day, the Clerk of Court intimated to him that the protestation money had been consigned, and declined to issue extract. The defr.'s agent insisted on extract, as consignment was not a sufficient compliance with the Act of Sederunt to prevent extract, whereupon the Clerk said he would pay the protestation money, and declined to issue extract. This refusal was irregular and illegal. The defr. was entitled to expenses; and the pursuer cannot take advantage of this irregularity and illegality, and now proceeds with the action, and it ought to be held that, in effect, the protestation has been extracted, and that the present action, therefore, cannot be proceeded with, the instance having fallen.

3. An action *verbatim* similar to the present at the pursuer's instance, against defr., with the same *media concludendi*, was raised on 9th and served on 12th November. To that action there was stated a defence of *lis alibi pendens*, which was sustained by this Court, and the defr. was found entitled to expenses, which were taxed at £4 15s. 6d. and decerned for on 31st December last. That action is not yet final, as the process has not been extracted, and these expenses have not been paid. Till the action is final, and the expenses are paid, this prior action cannot be proceeded with.

The S. S. (Cheyne) pronounced this interlocutor:—

Kirkcudbright, 8th February, 1870.—Having at avizandum considered the closed record, for the reasons stated in the annexed note, repels the whole of the preliminary defences, but finds neither party entitled to any expenses connected with discussing the same; allows to the pursuer a proof of her libel, and to the defr. a proof of his averments in support of his plea that the aliment claimed is too high, and to the pursuer a conjunct probation: Appoints the proof to proceed within the Court-house here on Thursday, 17th inst., at ten o'clock forenoon, and grants diligence at the instance of both parties for citing witnesses and havers accordingly.

Note.—The *first* preliminary plea is maintained on two distinct grounds, founded respectively on the 3d section and on the 15th section of the Sheriff-Court Act 1853. To these it will be necessary to advert separately.

(1st.) Section 3 provides that "where a defr. intends to state a defence, he shall enter appearance, by lodging with the Sheriff-Clerk, at latest on the day of comparance, a notice in the form of Schedule (C) appended to this Act, and on the first Court-day thereafter, or on any other Court-day to which the diet may be adjourned, not being later than eight days thereafter, the Sheriff shall hear the parties in explanation of the grounds of action, and the nature of the defence," etc. Founding on this provision, the defr. maintains that the instance has fallen, and that it is now incompetent for the Sheriff to hear the parties, or proceed with the case, inasmuch as, while the day of comparance was 18th October, the case was not enrolled on the next Court-day thereafter, nor until 21st January, and compliance with sect. 3 is therefore impossible.

This is to the Steward-Substitute a novel argument. Until he heard it he had always understood that, subject it may be to the provisions of sect. 15 of the statute, the pursuer of a defended action might enrol his summons when he liked, the defender having it in his power to protect himself against undue delay, and to force the pursuer on by means of protestation. If, however, the argument now under examination is well founded, protestation is practically abolished in the Sheriff-Court, at least where appearance

is entered, for what is the use of taking out protestation if the summons falls, *eo ipso*, by the pursuer's failure to enrol it on the first Court-day after the *induciae* expire? The Steward-Substitute finds himself unable to adopt the defr.'s view in the absence of any authority for it, in the shape either of a decided case, or of a writer on Sheriff Court practice. He cannot think that the framers of the Act, if they meant to attach such a heavy penalty to failure to enrol for the first Court-day, would have left it to be matter of implication; they would have made it matter of express enactment. It will be seen from Barclay's *M'Glashan* (4th ed., sect. 1037), where the very case is supposed that has occurred here, that the learned editor of that work is quite ignorant of the view now advanced by the defr.; and indeed, from his taking out protestation, it is evident that it is only recently that it has suggested itself to the defr. himself.

(2d.) But the defr. maintains under his first plea—though, in this view of it, it is not very happily expressed—that the action stands dismissed under sect. 15 of the statute, in respect that, as he alleges, nothing was done in it between 18th October and 21st January, a period of more than three months. But *ex facto aritur jus*; and the defr. has overlooked the circumstance, which the diet book of Court discloses, that on 29th October, (i.e., within three months of 21st January), the case appears in the roll, with this entry opposite to it, "protestation granted," which, looking to recent decisions of the Supreme Court, the Steward-Substitute cannot hesitate to hold "a proceeding in the cause" (See *Stewart v. Grant*, 29th March, 1867; 39 Jur. 373; *Gordon v. Souter*, 28th May, 1869; 41 Jur. 446).

The pursuer met the plea in another way, viz., by referring to a case decided in the Sheriff Court at Ayr (*A. v. B.*, 14th March, 1865; 4 Law Journal (new series), p. 54), where it was held that the provisions of sect. 15 did not apply till the case had actually appeared in the Rolls of Court. This would, of course, be a conclusive answer, assuming the law to be as there laid down; but with all respect for the learned judge who pronounced that decision, the Steward-Substitute has strong doubts of its soundness, and in particular he is unable to assent to the *ratio* upon which it proceeds, viz., that a Sheriff-Court action does not "depend" until enrolment. However, in the view which he takes of the facts of the present case, it is unnecessary for him to determine the point one way or the other.

2. Even assuming that the Clerk was wrong in refusing to issue extract of the protestation, as alleged by the defr., which it is not *hujus loci* to determine, the pursuer cannot be affected by what the Clerk chose to do. As a matter of fact, the protestation is at this moment unextracted, and the protestation money having been consigned, the pursuer may "call and insert in her action without a new citation," under sect. 27 of the Act of Sederunt, 10th July, 1839. In justice to the Clerk, however, it may be stated that he offered to give the defr. a simple extract, but refused to insert in it a precept of poinding (which the A. of S. does not make it compulsory on him to do—see sect. 26), on the ground that the protestation money had been consigned in his hands for the defr.'s behoof. The defr., however, declined to take a simple extract. It is also not unworthy of notice, that the pursuer is suing in *forma pauperis*, and, as the defr. can get the protestation money whenever he chooses to ask for it, it would be hard to put the pursuer to the expense of a new summons.

3. The defr.'s third plea is equally groundless, and, indeed, is almost ludicrous. It is sufficiently met by pointing out that the defence of *id*

alibi pendens stated by him, and sustained by both Stewards in the other action, was based upon the dependence of the present action, which is the earlier in date.

4. The fourth plea is founded on alleged defective specification as regards the date of the intercourse between the pursuer and the defender in the Castle Douglas Hotel, which is averred in the libel to have taken place "during the month of September, 1868." The Steward-Substitute has no difficulty in holding this plea to be a bad one. The defr. assumes that the pursuer intends to prove only one act of intercourse in the hotel referred to, but how does that appear? The phraseology would rather suggest that the intercourse took place on various occasions during the month, and such may turn out to be the fact. But, apart from this consideration, a month's latitude may very fairly be allowed to the pursuer of an action of this nature, especially when proof of connection on *any* day of the month would be consistent (as it would be here, where the child is alleged to have been born on 30th June, 1869) with the conclusion that the pursuer's child was the fruit of that connexion.

5. In explanation of the finding as to expenses in the preceding interlocutor, it may be stated that, the pursuer's agent having failed to attend on 28th January, in compliance with the order of Court to that effect, the defr.'s agent applied to be allowed his fee for attendance, which the Steward-Substitute would have granted under the power conferred upon him by Act VII. of the General Regulations appended to the A. S. of 1st March, 1861. The process had, however, not been returned by the pursuer's agent, by whom it had been borrowed, and the Steward-Substitute was consequently unable to give decree for the fee on that day, but he took a note of the application, and may be held to have practically granted it him, by refusing to the pursuer the expense of discussing the preliminary pleas, which he would otherwise have allowed her.

The defr. appealed.

Kirkcudbright, 11th March, 1870.—The Steward-Substitute having considered the proof and whole process, Finds, in point of fact, that the pursuer has failed to prove that the defr. is the father of the child born upon 30th June, 1869: Finds, in point of law, that the defr. is entitled to be assoilzied from the whole conclusions of the action; assoilzies him accordingly therefrom: Finds him entitled to expenses, whereof allows an account to be lodged, and remits the same, when lodged, to the auditor of this Court to tax and report, and decerns.

Note.—The Steward-Substitute has found considerable difficulty in coming to a decision in this case, owing to the meagreness and conflicting nature of the proof. The evidence of the pursuer is distinctly affirmative of the paternity, and that of the defender is as distinctly negative, while the evidence of the other witnesses adduced might be shown to consist with either view of the case. It is clear that one of the parties to the cause has been guilty of most deliberate perjury, and the Steward-Substitute is compelled to resort to a balancing of incidental circumstances in order to determine which of their statements is most deserving of credibility.

On the following points there is no doubt whatever, viz.:—That the defr. was alone in the pursuer's company on the two occasions when the acts of connection are alleged to have taken place, namely, the 28th September

and the 2d October, 1868; that the pursuer did give birth to an illegitimate child upon the 30th June, 1869; that the period of 270 or 275 days closely agrees with the usual period of gestation; that at a period of six or seven years previous to the birth of this child the pursuer had borne to the defr. two children, one still-born, the other a child now alive, which the defr. acknowledges, and for which he has been paying voluntarily certain sums by way of aliment; that during the intervening six or seven years the defr. had been in the habit of occasionally seeing the pursuer, they living about five miles apart, and he is alleged to have done so upon different occasions both before the 28th September and after the 2d October, 1868. Had the proof taken the old form of *semiplena probatio*, with the oath of the pursuer in supplement, the Steward-Substitute might have felt himself bound to hold the pursuer's proof sufficient. But under the present law of evidence, he conceives that he is now required to weigh the testimony of the pursuer, who has tendered herself as an ordinary witness in the cause, in the same manner as that of any other witness, and however strong a presumption the *prima facie* view of the facts already stated may raise against the defr., the Steward-Substitute is satisfied that the incidental and circumstantial evidence in the case is sufficient to overthrow that presumption, and to corroborate the explanatory statements of the defr.

First, with regard to the alleged connection upon 28th September, 1868, the Steward-Substitute was at first disposed to think that there must have been two meetings upon that day, one of them spoken to by the pursuer and by the witness Burnie, the other by the defr. and by the witnesses Sarah Hutchings, or Rowe and M'Robert,—the latter meeting occurring in the fore part of the day, and the former at a later hour, and in the same room. Were this the fact, the difficulties of the case would disappear. But in the absence of any hint in the pursuer's evidence that there were two such meetings, the Steward-Substitute feels obliged to reject this view, and as a consequence to reject the idea that any connexion took place, as alleged, at this meeting. For the defr.'s statements regarding the nature of that interview are substantially corroborated by the other witnesses. He states that he was in the room in question along with M'Robert and other two men on the forenoon of the day in question, that the pursuer, who was engaged to assist in the hotel during the fair, waited on them, and as they were going out, called him back into the room to speak with her. When she got him back into the room, she began asking for money for her child, and set her back to the door to prevent his getting out. Having no money to give her, he said he would be at Dalry at the latter end of the week, and would call at her father's house and give her some. After they had been seven or eight minutes together in the room, the landlady, Mrs Rowe, missing the pursuer from her work, went to look for her, and found her, as she states in her evidence, with the defender in this room, and one of the parties had their back against the door, so that she, the landlady, could not get in. On the door being opened, the defender went out and joined M'Robert in front of the hotel, and on being asked what the pursuer wanted with him, he told M'Robert that she was wanting money for her child. M'Robert also corroborates the defr.'s statement as to the length of time they were together in the room. This account is much more credible than that of the pursuer, when she alleges connexion to have taken place at this interview, and when the extreme inherent improbability is taken into account, that the parties, who had every oppor-

tunity of meeting at another time, should choose the back parlour of an inn, lying between the bar and the kitchen, with a door off the main passage from the street, and without a lock or any means of security from interruption, and the forenoon of a busy fair day in a market-town, as the place and time for sexual intercourse, the Steward-Substitute is of opinion that the pursuer's statement on this head is entirely discredited.

Secondly, With regard to the act of connexion alleged to have taken place on Friday, 2d October, it also rests entirely upon the pursuer's statement. A meeting did take place. The defr. called in the evening at the house of the pursuer's father, in the village of Dalry, as he describes himself to have promised to do at the previous interview on the 28th September, for the purpose of paying the pursuer something towards the aliment of her child. Being intimate with the family, he sat a while, and on going out he asked the pursuer to speak with him at the door, for the purpose of paying her the money. She walked down the street with him, asking for more, and at the head of the street turned and left him. The pursuer's version of the story is, that she was about two hours with him, and that he took her into a field on the farm of Tower and there again had sexual intercourse with her. Her statement is quite unsupported, her sister's evidence being entirely untrustworthy, from the way it was delivered, and from her pretended ignorance of the date of the Clachan fair, the chief event of the year in the neighbourhood in which she had lived twenty years, she putting it in April instead of November. How could she state that the pursuer was with the defr. during these two hours, and not elsewhere?

On the whole, therefore, the Steward-Substitute is of opinion that the defr.'s statement deserves more to be believed than the pursuer's. And there are certain incidental circumstances suggested by the evidence, which lead him to think that he has formed a right estimate of the truth of the parties' statements regarding these two alleged acts of connexion. These are, that the pursuer has already had six illegitimate children, extending over a period of nearly ten years, if not more; that the defender is admittedly the father of two of these, which were born seven years ago; that he has acknowledged the paternity, and been voluntarily paying aliment off and on during this time; that there is no proof of his using improper familiarity with the pursuer since, it being known to the landlady of the inn, Mrs Rowe, for instance, that his object in asking for her and seeing her was to pay her money for his child; that, on the contrary, he had been courting another woman, and was to have been married to her, when the marriage was broken off, and this lately, by the interference of the pursuer; and lastly, that the pursuer, having already had three children to another man, it appears probable that this child also was not the defender's; but, that, from his having admitted the paternity of a previous one, and being known occasionally to be in communication with her, she has chosen him as the easiest person to fix the paternity upon.

Although the evidence in the case is very narrow, the Steward-Substitute is satisfied, not only that the pursuer has failed to prove that the defr. is the father of her child, but that he has gone some way towards fairly establishing that he is not.

Ad.—C. P. Richardson, Castle-Douglas.——Alt. R. Broatch, Dalbeattie.

English Cases.

RAILWAY—Packed Parcels—Equality of Charge—Intercepting Carrier.
—The plaintiff in the original action was a carrier in London, and his chief business was to collect parcels, pack them together in one parcel, and send the parcel so packed by the defendants' railway to agents in the country, who unpacked and distributed the enclosed parcels to the different persons to whom they were addressed. The plaintiff's carmen, on taking the packed parcels to the railway station, took with them a printed form of declaration (furnished by defendants) with different headings, in which were columns for the name and address of the consignee, the description of package and contents, and at the foot of the declaration was a notice that "all parcels of goods and packages the contents of which are not properly declared by the senders, will be charged with the highest class; and all such parcels of goods and packages not exceeding 500lb. in weight, if the contents shall not be declared, will be considered as each containing different kinds of articles, and each such parcel of goods and package will accordingly be subject to the regulation relating to 'smalls,' and charged for accordingly." Before the goods left the plaintiff's office he filled up the different columns of the declaration, and any package containing several parcels of different kinds of goods, was always described therein as "packed." The defendants charged for the carriage of goods according to their nature and description, by a tariff containing five columns of increasing rates of charge, and a column headed "class—packed parcels," stating the charge for them to be the highest of the five rates of charge, "and 50 per cent." All the packed parcels carried for the plaintiff were charged at this rate. The plaintiff brought an action to recover the extra charge so paid for his packed parcels, on the ground that the defendants knowingly carried packed parcels for other persons at a lower rate. The following evidence (excepted to) was admitted at the trial: That of several wholesale warehousemen and drapers, to the effect that they were in the habit of sending packed parcels by the defendants' railway, and that they were charged for their carriage at the fourth class rate in the above tariff, being the rate for drapery goods, and without an extra charge of 50 per cent., and that the defendants were aware of the above practice as to packed parcels, though the fact of a parcel being packed did not appear from the outside of it; and that upon an arbitration between another carrier and the defendants, witnesses proved, in the presence of the defendants' solicitor and traffic manager, the practice of warehousemen and others to send packed parcels by their, the defendants', railway, and that the practice of packing parcels was notorious among carriers. The judge directed the jury that there was evidence on which they might find that parcels had been carried by the defendants for other persons containing goods of a "like description and under like circumstances" at a less rate than such goods were carried by them for the plaintiff, and also upon which they might find that the defendants knowingly and purposely charged the plaintiff more than other persons. The jury thereupon found a verdict for the plaintiff—*Held* (affirming the judgment of the Exchequer Chamber on a bill of exceptions), that the evidence was properly admitted; that the direction of the judge was right, but imperfect in the omission to explain to the jury the meaning of the terms, "of a like description, and under like circumstances;" and that proof of specific instances of inequality of charge

was unnecessary. The defendant's company's special Act of Parliament (7 and 8 Vict., c. iii., sec. 50,) provided that charges for carriage of goods must be made "equally to all persons" in respect of all goods of a "like description," carried "under the like circumstances;" and a subsequent special Act (10 and 11 Vict., c. ccxvi., sec. 53) provided that for carriage of small parcels the company might demand "any sum they think fit." The Railway Clauses Consolidation Act 1845 (incorporated with the Company's Acts), by sect. 90 enacted that the company might vary the tolls, but that such power of varying should not be used "for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly," provided that such tolls be charged "equally to all persons, and after the same rate," in respect of all goods carried over the line under the same circumstances, and that no reduction or advance be made "in favour of or against any particular company or person"—*Held*, that the incorporating clause of 10 & 11 Vict., c. ccxvi., incorporated the provision for equality of charge in 7 & 8 Vict., c. iii., s. 50; for the provision for equality of charge in the latter Act is not inconsistent with the power given to the company by sect. 53 of the former Act, to demand any sum they think fit for parcels not exceeding 500lb. in weight. The absolute power to charge any sum the company may think fit is not reduced to a conditional one by requiring that the tolls shall be equally charged to all persons; nor does this even operate as a qualification of the power itself—*Held*, also, that the equality clauses of the special Act and Railway Clauses Act applied to the extra charge for packed parcels; that the words "same" and "like" in those Acts had not different meanings, and that the words were used not with reference to the contents of the parcels, which the company had no means of knowing, but to the parcels themselves, according as they were like or different for the purpose of carriage; and that the words "under the same" or "under like circumstances," referred to the conveyance of the goods, and not to the class of persons for whom they were carried—*Held*, lastly, that an action for money had and received would lie to recover back the overcharges made upon the carriage of the plaintiff's goods, such overcharges being in violation of an obligation imposed on the company by Act of Parliament to charge all persons equally.—*Bazendale v. The Great Western Railway Company*, 16 C. B., N. S., 140; 9 L. T. Rep. N. S. 814, approved; *Garton v. Bristol and Exeter Railway Company*, 1 B. & S. 112; 30 L. J. 273, Q. B., overruled; *Great Western Railway Company v. Sutton*, 22 L. T. Rep. N. S. 43. H. of L.

BILL OF LADING—Damage to Cargo.—The bill of lading exempted the shipowner from liability for negligence by his master and crew. In an action for damage to the cargo by such negligence, he was held not to be liable.—*The Duero*, 22 L. T. Rep. N. S. 37. Adam Et.

LIABILITIES OF RAILWAYS.—The company is bound to take reasonable care that the handles of the carriage doors are fastened; but if a passenger leans too heavily upon the door and it opens, he is guilty of contributory negligence.—*Warburton v. The Midland Railway Company*, 21 L. T. Rep. N. S. 835. Blackburn, J.

An engine fell over the line into plaintiff's garden through negligence, and damage was done to flowers in the garden by the crowd assembled there, such damage was held to be too remote.—*Scholes v. The North London Railway Company*, 21 L. T. Rep. N. S. 835. Keating, J.

The carriage of a train in which plaintiff travelled overshot the platform

at the station. The name of the station was called out, the train was not backed, plaintiff descended in a dark place, and was injured. He had not been requested to alight there. The company was held not to be liable.—*Plant v. The Midland Railway Company*, 21 L. T. Rep. N. S. 836. Bramwell, B.

ELECTION PETITION—General Intimidation—Undue influence of Ministers of religion.—A general refusal by bishops and clergy of the solemn rites of the Church to persons on account of their voting or not voting in a particular way, will void an election. But the Court recognised the full right of the Roman Catholic clergy to address their congregations; to advise them to canvass the merits of the candidates; to tell them that one man is for the country and another against it; that one man is for a Church which they think ought to be disestablished—so long as there is no play upon the superstitious feelings of the people. The ruling in the *Dublin* case affirmed, namely, that general bribery and general treating will invalidate an election, though not directly traceable to the candidate; and that general intimidation, whether lay or ecclesiastical, will upset every election at which it is practised. The case of *Huguenin v. Basely* (coram Lord Eldon 1807) cited and applied.—*Galway Election Petition*, 22 L. T. Rep. N. S. 75. Keogh, J.

NEGLIGENCE—Stand on a Racecourse.—The defendant, acting on behalf of himself and several other persons interested in certain horse races, entered into a contract with Messrs. E., by which Messrs. E. engaged to erect and let to them a temporary stand for the accommodation of persons desiring to see the races. The defendant on behalf of himself and his colleagues, all acting gratuitously, received a sum of money, which was appropriated to the race fund, from each person who used a place on the stand. Messrs. E. were competent and proper persons to be employed to erect the stand, but it was in fact, though unknown to the defendant, negligently erected by Messrs. E., and fell and injured the plaintiff, who had paid for admission to the stand, and was on it at the time it fell—*Held* that the defendant, by receiving money from the plaintiff as the price of his admission to the stand, entered into a contract with the plaintiff by which he impliedly warranted that due care had been used in the construction of the stand by the persons employed to erect it as well as by himself; and, therefore, that the defendant was liable for the injury sustained by the plaintiff owing to the negligent construction of the stand by Messrs. E.—*Francis v. Cockrell*, 22 L. T. Rep. N. S. 203, Q. B.

DAMAGE—Proximate cause—Negligence.—Defenders were Commissioners under an Act of Parliament for improving the drainage of the fen lands, and in consequence of their negligence, the western bank of a cut made by them under their act gave way, and through the breach in the said bank the waters of a tidal river overflowed the low lands lying west of the cut. Plaintiff was possessed of land on the eastern side of the cut, the water from which land used to drain to the west side through a culvert of defendant's, which by their Act of Parliament they were to maintain open for a free passage of such water. After the bank had given way, but before the waters of the flood had reached the culvert, plaintiff stopped up the culvert, but the occupiers of lands on the west side of the cut, considering that the stopping of the culvert would be injurious to their lands, by preventing the great body of advancing water from finding an outlet there, removed the stoppage, and the result was that the flood waters passed through the

culvert from the western to the eastern side of the cut, and reached and inundated plaintiff's land. In an action by plaintiff for the damage sustained by his land being so inundated—*Held*, that plaintiff was entitled to recover such damage, notwithstanding it arose in part by the opening of the culvert after plaintiff had stopped it up, as such damage was the natural result of defendant's negligence.—*Collins v. Middle Level Commissioners*, 38 L. J. C. P. 236.

JURISDICTION—Foreign government—Loan negotiated in England—Foreign contract—Hypothecation.—If a foreign government violates a contract entered into with British subjects resident in England, the Court cannot, in the absence of that government, apply its property in this country to the relief of the injured parties. A loan contracted by a foreign state by its agent in this country is a foreign contract. A foreign company, under a contract with a foreign government, *Held* that the surplus proceeds of guano shipped to this country remaining after the satisfaction of certain prior charges at the disposal of that government. The foreign government contracted a loan by its agent at this Court, to be secured by hypothecation of the guano shipped to this country. The foreign government did not appear—*Held*, that the Court of Chancery could not direct the guano shipped to this country to be applied according to the terms of the hypothecation.—*Smith v. Weguelin*, 38 L. J. Ch. 465.

WILL—Divesting Clause—Survivors or survivor—Death of all legatees before period of distribution.—Bequest of personalty to M. B. for life, and after her decease to eight persons by name in equal shares, with a direction that in case of the death of any of them before the death of M. B. the share or shares of him, her, or them so dying should be paid to the survivors or survivor, share and share alike. The eight legatees survived the testator, but all died in the lifetime of M. B.—*Held*, that the divesting clause had no operation, there being no survivor at the death of the tenant for life, and therefore the original one-eighth share of each legatee passed to his representatives.—*Crowder v. Stone*, 7 Law J. C. 93, is a questionable authority.—*Marriot v. Abell*, 58 L. J. Ch. 451.

DISSENTING MINISTER—Endowment—Trustee and cestui que trust—Appointment of minister—Power of the majority of the trustees and of the congregation to remove—Injunction.—A congregation of Protestant dissenters was endowed, by deeds vesting in the trustees of the society freehold and leasehold hereditaments and premises upon certain trusts for its benefit. The deeds contained (*inter alia*) a trust "to permit and suffer the minister or pastor for the time being of the congregation to have the use or occupation of a house," or "to pay the rents and profits thereof to such minister or pastor, as the same should become due and payable for so long a time as such minister or pastor should from time to time be and continue minister or pastor of the society or congregation, and officiate as such, and no longer, to and for his and their own use and benefit. Neither the deeds nor the rules and regulations of the society contained any provision as to the mode of ascertaining the will of the congregation upon the dismissal of a minister or pastor; and the only specific grounds stated for his removal were either immorality or heterodoxy. The defendant was unanimously elected by the congregation one of their co-pastors. Sometime after his election the congregation became dissatisfied with the mode in which he discharged his duties, and dissensions ensued. Ultimately a meeting of the

congregation was held, and a resolution passed by the majority of the members present at it, that the defendant should be dismissed. No special ground was assigned for his dismissal. He questioned the legality of the meeting, and denied the power of the majority of the congregation, or of those present at the meeting to remove him, except for immorality or heterodoxy, neither of which was imputed to him. He further claimed the right to hold his office of co-pastor and to officiate as such and take the emoluments of the office for his life. The majority of the trustees then filed a bill to have it declared that he was properly dismissed from his office, and for an injunction to restrain him from interfering with the property and the services in the chapel of the congregation—*Held*, that the defendant was not entitled to preach or officiate in the chapel of the society against the will of the majority of the trustees and of the congregation; that he must be restrained from so doing, and in other respects as prayed by the bill; and that he must pay the plaintiffs their costs of the suit.—*Cooper v. Gordon*, 38 L. J. Ch. 489.

TRUST—Breach of Trust—A marriage-settlement executed in May, 1817, contained a covenant by the husband with a trustee to pay to the trustee within three years a sum of £3000, to be held on the usual trusts, in favour of the husband and wife and issue of the marriage, or else to secure that sum by mortgage. The money was neither paid nor secured, and the trustee never attempted to enforce the covenant, but acted as solicitor to the purchaser on a sale in 1846 by the covenantor for his own benefit of the property he had covenanted to mortgage. The trustee died in 1848; his sons had notice of the settlement in 1851. The covenantor became bankrupt in 1852, and applied to the widow and executrix of the trustee to prove for the £3000, which she declined to do. Dividends of 11s. in the pound were declared in the bankruptcy, and new trustees of the settlement were appointed by the Court, whose proof was rejected as too late. The widow and executrix of the trustee died in 1865, and his sons entered into possession of his property as devisees and legatees under his will, but when cited to take out letters of administration to their father, they declined to do so. Upon a bill filed on the 2d of October, 1867, by the widow and children of the covenantor and the new trustees, against the sons and an administrator *ad litem* of the deceased trustee, in answer to which the sons admitted assets—*Held*, first, that the sons having admitted assets, the administrator *ad litem* represented the deceased trustee sufficiently for the purposes of the suit. Secondly, that the rights of the plaintiff were not barred by lapse of time, and that the sons were liable to make good the loss occasioned by the breach of trust to the extent of the assets of their father in their hands.—*Woodhouse v. Woodhouse*, 38 L. C. Ch. 481.

APPORTIONMENT—4 & 5 Will. IV., c. 22—Under a will, dated 1858, A. was tenant for life of an estate subject to impeachment for waste. B. was tenant for life of the same estate in remainder without impeachment for waste. In A.'s lifetime the Court had authorised the sale of some of the timber on the estate, and had ordered the dividends of the money arising from such sale to be paid to A. during his life. After A.'s death B. claimed the whole of the dividend which was accruing at the death—*Held*, that each dividend was not apportionable between B. and the personal representatives of A.—*Jodrell v. Jodrell*, 38 L. J. Ch. 507.

THE

JOURNAL OF JURISPRUDENCE.

THE ENGLISH JUDICATURE BILL.

SCARCELY a year has elapsed since the proposals of the English Judicature Commission were made public. An outline of them was given in this *Journal* for June last. Already two government bills are before Parliament, purporting to carry out the suggestions of that Commission. The main features of these bills have met with a very cordial and general approval, both from the public and from the legal profession. But to part of the government scheme objections are made by authorities who must be listened to with respect. The first and most formidable criticism came from Lord Cairns, whose position as chairman of the Commission, to say nothing of his personal weight in the House of Lords, would make the passing of the measures against his persistent opposition an almost hopeless task. But it must be confessed that the objections made by Lord Cairns on the first occasion when the subject was debated before the House, have the aspect of evincing merely his view *primæ impressionis*; and there is reason to hope that some of them may be withdrawn on fuller consideration, and others put in the shape of amendments and embodied in the bills. A criticism of scarcely less importance, and raising questions of a different kind, is now put forth by the Lord Chief Justice of England in the form of a letter to the Lord Chancellor, and published as a pamphlet.* Another contribution to the literature of the subject, in the shape of a pamphlet entitled "Transfer of Land Bill and other Bills in Parliament," is made by Lord St. Leonards, happily designated by his rival as "the Nestor of the Profession."

Of the brochure last mentioned it will be enough to observe that it entirely denies the necessity of what is now called the "fusion of law and equity." But upon this point the opinion of the legal profession, as well as of the public, is already so advanced that the question has

* Our Judicial System. A letter to the Lord High Chancellor on the proposed changes in the judicature of the country, by the Right Hon. Sir Alexander Cockburn, Lord Chief Justice of England (*Ridgway*).

become merely one of method—as to the best means of reaching this consummation—the desirability of the end itself being no longer in doubt.

Another objection must be here mentioned, merely to be laid aside. The Chief Justice demurs to the proposed Committee of Council, on the ground that they would be constantly interfering with the actual distribution and order of the business before the Courts. Now this is clearly a misconception of the duties and powers proposed to be assigned to that Committee. They are to make *rules* for the distribution and order of business; and will have power to amend the rules when made. But it by no means appears that they are intended to have any arbitrary power or discretion in interfering with the actual course of the business.

The great issue, however, which is taken upon these bills is this:—Is it expedient that the power of framing a Code of Procedure should be delegated to a body outside Parliament, and if so, is the proposed Committee of Council (consisting of the Lord Chancellor, the Chancellor of the Exchequer, and other Privy Councillors to be appointed by Her Majesty), the most appropriate body for the purpose? It is said in effect, both by Lord Cairns and the Chief Justice, “Commit to competent persons the work of framing a complete code of procedure, and come to Parliament next year with a bill embodying such a code. Delay will not necessarily be caused, since the present bill is not proposed to come into operation until November, 1871.” A precedent for this course is found in the Common Law Procedure Act, 1852. It might be a sufficient answer that this would be only an indirect mode of delegating legislation, which it is now proposed to delegate in a direct and avowed manner. But a more weighty argument against this course is to be found in the amount of money which has been sunk for many years past in tentative, impracticable, and abortive commissions. What guarantee is there that the persons to whom the task is committed will accomplish the desired work? On the other hand, the proposed Committee of Council would commence their task with the consciousness of power to work with effect, and as they would contain within their body two responsible ministers of the Crown, there would be some guarantee for the work being prosecuted earnestly and efficiently.

Another objection of a constitutional nature, brought forward by the Chief Justice, seems worthy of more serious consideration.

“The inherent vice of this Bill as at present conceived—to my mind at least—is that it essentially compromises the independence of the Superior Courts. At present, with the exception that their decisions are—as those of every Court of primary jurisdiction ought to be—subject to revision on appeal, these Courts are free from all control save that of the law which they administer. And this independence is not only their inherent right, but it is essential to the public weal. It is this entire independence of all governmental control that secures to them the perfect confidence of the public. But, by the proposed Bill.

Courts and Judges are to become subordinate divisions of a general Court, of which the Lord Chancellor is to be the presiding and directing power."

Now, in consequence of the misapprehension already alluded to, the Chief Justice exaggerates the power intended to be conferred on the Lord Chancellor by this bill. The point above suggested is one nevertheless of constitutional importance. It is a standing anomaly in the English judicial system, that one most important branch of judicature should be presided over by a Judge holding office, not *ad vitam aut culpam*, but at Her Majesty's pleasure. And this anomaly is proposed to be vastly extended by the present bill. The bill confers upon the new court of justice, and on every branch of it, all jurisdiction heretofore belonging to any of the existing Superior Courts. So that the Lord Chancellor, *who holds office during the pleasure of Her Majesty*, will be invested with all the criminal and other prerogative jurisdiction heretofore exercised by the Judges of the Queen's Bench, whose independence of the Crown—their office being held *quamdiu se bene gesserint*—belongs to the landmarks of the Constitution.

This is a serious objection, and it ought to be fairly met. I confess I should be inclined to meet it by a novel and perhaps bold suggestion. Why should the Lord Chancellor be a member of the High Court of Justice at all? At least it might be arranged that his presidency should be nominal. Even now the judicial functions which he personally exercises—except as a member of the ultimate Court of appeal—are intermittent or merely occasional. And if the proposed Legislative Committee of Council is carried out, there will be a new field for his activity. For if the Committee of Council for framing a code of procedure is once organised, it is not unlikely that other important functions will from time to time be given it. Indeed, it is understood that the Digest Commission, in their final report, have agreed to recommend a committee of similar constitution as the best means of carrying out the work of digesting or codifying the law. And if this recommendation should be carried out, the same Committee of Council would doubtless superintend the framing of a code of procedure and the digesting of the whole law.

The vexed question of the ultimate Court of appeal remains still to be touched upon. In the first draft of the Appellate Jurisdiction Bill, a scheme was put forward which should reconstruct the Court of ultimate appeal by a committee of the House of Lords supplemented out of the Judicial Committee of the Privy Council. But this course, in the present form of the bill, has been abandoned.

The reconstruction of the Court of ultimate appeal is pre-eminently a Scotch question. The old right of *protestation for remeid of law* against iniquity of the Judges, out of which the jurisdiction of the Lords in Scotch cases grew, was, in the time of the old Scotch Parliament, deemed a popular right. It occasioned the celebrated "Secession of the advocates," and it stood among the articles of the claim of

right made by the Scottish Convention in 1689. This power of giving redress being unprovided for under the articles of Union, got by some fluke—there is really no other way to describe the process—into the House of Lords. The jurisdiction of the House of Lords in Scotch cases, with all its faults as an appellate court, now enjoys considerable popularity. The Scotch appeals annually number more than those from England and Ireland put together. The reason of this may be that there is thought to be more chance for the appellant. And this may be said without making any reflection upon the wisdom of the Scotch Judges; for in the appellate court the case is considered and often argued by persons having a new and varied stock of experience to contribute. But whatever may have been the reasons for which the law peers in the Court of appeal may have given general satisfaction in Scotland, they clearly do not arise from any sentiment of prestige attaching to the House of Lords, by whom the judgment is nominally given. Any tribunal which would secure the highest available judicial attainment and experience, and would be free from a traditional adherence to merely English legal notions, would equally command the respect of Scotch suitors and the Scotch public. These two conditions are essential. And therefore the tribunal must be something outside of the English court of justice. But whether it be a permanent committee of the House of Lords, with life peers admitted for the purpose, or whether it be the judicial committee of the Privy Council, or a combination of both, provided only it really enlist a sufficient number of Judges of the highest order to sit permanently, are questions with which Scotland and the Scotch legal profession have no interest to interfere.

There is indeed reason to regret that the Lord Chancellor has thought fit to abandon the proposal contained in the first draft of his bill. The proposal would have formed a good precedent for a similar constitution of an appellate court for Scotch cases; and since the considerations which are said to have caused the alteration, scarcely apply to Scotland. The jealousy standing in the way of a change is said to proceed not from the House of Lords itself, but from the House of Commons, who, it is feared, may renew the controversies of 1675, and decline to recognise the fact that the House of Lords has, at least on the equity side, any appellate jurisdiction at all. The Court of ultimate appeal suggested by the first draft of the Chancellor's bill would have been a very strong one. The Judges entitled to sit in the House of Lords would have been reinforced by Judges from the Privy Council. There would have been a minimum quorum of three, and the Court would have sat permanently. If such a Court had adopted the practice of the Privy Council by delivering single judgments, settled after joint deliberation, it would have combined nearly all the elements by which an ultimate Court of appeal can approach perfection.

R. C.

PAPERS OF THE SCOTTISH LAW AMENDMENT SOCIETY.*

REMARKS ON MR STEPHEN CAVE'S BILL "TO AMEND THE LAW RELATING TO LIFE ASSURANCE COMPANIES," AND THE PRINCIPLES OF LEGISLATION APPLICABLE TO THESE INSTITUTIONS.

By SAMUEL RALEIGH, F.R.S.E.,

MANAGER OF THE SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY.

HITHERTO there has been little or no general legislation in this country regarding Life Assurance Companies, and the manner in which their business should be conducted. The leading Companies have mostly been incorporated, or specially empowered, by *private* Acts, embodying their own Articles of Constitution, and conferring certain privileges, but no general measure in the public interest was ever passed, except, perhaps, the "Joint Stock Companies Act" of 1844, which required the registration of new Companies, and the publication of their accounts,—a measure which, as regards its effect on Life Assurance Companies, proved useless, if not pernicious, and which is now merged in "The Companies Act" of 1862.

In 1853 a Committee of the House of Commons, of which the late Mr James Wilson was chairman, made an extensive inquiry into the principles on which Life Assurance business was conducted, and the evidence then taken and reported, in a large Blue-Book, contains a mass of information and opinions, furnished by actuaries and other persons of skill and experience, which was at the time, and still is, of great value. Upon that Report an endeavour was made by Mr Wilson to pass a Bill, which would have introduced substantially the same regulations as are now to be found in Mr Cave's Bill. After running the gauntlet of a good deal of discussion in Parliament, and out of it, it was finally abandoned in 1857.

In 1867 an Act legalizing Assignment of Policies of Life Assurance was passed in order chiefly to obviate a peculiarity of the law of England on that subject.

For many years there has been growing up a strong suspicion that the business of Life Assurance in this country has been conducted, by some Companies, in a reckless and improper manner. Along with this suspicion there arose very naturally a desire to know more about the exact financial condition of Life Offices than they have generally been in the habit of affording the public the means of ascertaining. I may be permitted to mention in passing, that having long held decided views of the evils of secrecy, or what is as bad, if not sometimes worse, partial disclosure, in Financial Institutions generally, I have, at various times, sought to encourage the demand for publication of accounts by Life Assurance Offices. A paper which I read at the National

* The papers selected for publication by the Council of this Society will, by arrangement, be published in the *Journal of Jurisprudence*; but the Society is not to be understood as becoming in any sense responsible for the other contents of the *Journal*; and the conductors of the *Journal* do not assume any responsibility for the style or opinions of the Papers of the Scottish Law Amendment Society.

Association for promoting Social Science, when it met in Edinburgh in 1863 was (I have been told) the means of suggesting to parties in Manchester the sending of a memorial and deputation to the Board of Trade (when Mr Stephen Cave was Vice-President of that department), in connection with Lord Derby's Government.

Mr Cave had a measure in contemplation when the last Government went out of office, and he brought it into Parliament last Session (1869), as a private member of the House, having received a promise of support from the present Government. That Bill was approved generally by the Companies. Having gone into Committee, it never found its way out, and so legislation was again postponed for another Session.

Meanwhile the disastrous failure of "The Albert" in autumn of last year, and the movement to have another large office also wound up, produced no little excitement in the public mind, and led to a general expectation that the Government itself would feel forced to take up the subject; and might not improbably bring in a more stringent Bill than Mr Cave's. This expectation has not been realized. Mr Cave is still in possession of the subject, with Government support, and the Bill which he has tabled during the present Session, though in some points altered from that of last year, is, in its leading principle and object, the same.

The *first* question presenting itself for consideration is: Whether it be right and expedient for the Legislature to interfere at all between the public and Life Assurance Companies? Whether it would not be better in the public interest to leave Policy-holders to protect themselves as they best can by demanding evidence of solvency from the Companies with which they transact. Although public opinion at present seems to demand legislative interference so urgently that this preliminary question is not likely to be much discussed, it will contribute to clearer views on the practical questions which afterwards arise, if at the outset I endeavour to define the principle on which legislative interference is, in the nature of the case, right and necessary, both as regards the Companies and the public.

The first idea we have in commercial and financial affairs is of course in favour of freedom, and against restraints and restrictions upon the voluntary contracts of the lieges. But while, on the one hand, the special protection of the Legislature is not to be desired for those who have the power and means of protecting themselves; on the other, when parties are either not able to protect themselves, or are not possessed of the means of self-defence, and will not be so without the help of public law, there are numerous precedents and examples fully supporting the right and duty of the Legislature to afford the assistance required.*

* (1) Employment of Women and Children; (2) Security for Bank-notes in circulation; (3) Shipping and Navigation; (4) Professional Diplomas and Licences,—may be specified among other subjects in regard to which the Legislature has acted on the principle founded on in the text.

Now, it is not difficult to show that, as regards Life Assurance, the public, and in particular, the provident classes of the community, who are most interested in that form of saving, have not now the means, and without legislative interference will in all probability never possess the means of protecting themselves.

The contract of Life Assurance is different in its nature from ordinary commercial transactions. It was stated in a recent article in the *Economist*, that there is no principle in Insurance Contracts which is not involved in Banking, and that interference with Assurance Companies, if sound in theory, should also be applied to Banks. This statement seems to have been made without duly recognising one important peculiarity in the existing practice of Life Assurance as it is carried on in this country. If a customer or depositor has occasion to doubt the solvency of his bankers, he can at once close his account by drawing out the entire balance at his credit. If his cheque be not instantly honoured, the insolvency of the establishment must, of course, be there and then declared. Now such a solution as this is impossible to Life Policy-holders. More especially is this so to those who, after long payments and by reason of advanced age may have the deepest stake in the soundness of the office. The contract in the case of a Bank is prestatable at any moment in the option of the creditor. In the case of a Life Office the obligation is not exigible till death, an event in the unknown and, it may be, distant future, and that only on conditions binding on the Policy-holder during his life.

The motive and moral character—so to speak—of the trust reposed in the custodier of the funds is also so different as to merit some consideration. In the case of Bank deposits, the money generally consists of surplus wealth and floating balances held ready for commercial enterprises. In these the owner is prepared to meet with loss, as he hopes to realize profit, and even in the Bank the depositor's money is known to be subject in some degree to the risks of trade. The payer of premiums to a Life Assurance Company, on the other hand, intrusts to it his generally hard-earned savings, in the faith of thereby securing, without risk or commercial loss, a provision at his own death, for helpless and dependent survivors, to whom failure in fulfilling the obligation will be a cruel disappointment or total ruin.

The nature of the risk undertaken by a Life Office, and the long-continued payment in anticipation of that risk involved in the payment of equal annual premiums (which is the system all but universally adopted in the practical conduct of Life Assurance business), is another element of difference which should not escape notice. The average premium for life, fixed according to age at entry, is always much in excess of the actual risk during the earlier years of the assurance. This excess gradually diminishes, till in later years the risk comes to be equal to the premium, and thereafter, until death, the risk continues to increase as against the premium of fixed amount. The point of explanation which it is important to notice here is, that the solvency of the Company and the payment of the Policies in full at death are

absolutely dependent on the payments in excess of the risk, received during the earlier years of the assurance, being laid aside and invested, without deduction or loss, and at the proper rate of interest, to meet the claims which must eventually arise.

When these peculiarities of the system are fairly considered, it does not seem reasonable that it should be in the option of Life Offices to withhold from the public evidence that their life-long contributions are being properly reserved and invested. Indeed, it seems to me to involve no little reproach to the system which is responsible for such a result, that, with reference to a very large number of Companies, no such publication has been made in time past, or can be regarded as in any degree probable in time to come, except under the pressure of legislative compulsion.

No doubt it may be said, Persons desirous of effecting Life Assurances for their families may demand all necessary information, and transact only with such companies as distinctly explain their position and prove their solvency; and to a limited extent this is true. But the number of those who are qualified to protect themselves in that way form an exceedingly small minority of those who desire and need to effect life assurances. In innumerable instances parties are so situated that they have no power to stipulate and select in the manner suggested; and even those who fancy that they are taking all proper precautions are too frequently deluded by showy statements, which the present system greatly favours, and which a uniform and compulsory system of publication would effectually explode.

In other civilized countries the business of Life Assurance is regulated by law, and in some of them a considerable degree of supervision and control is vested in Government.

In France, laws were passed in 1867 and 1868 placing Tontine and Life Assurance Companies completely under the inspection and control of Government, and companies are not permitted to begin business without obtaining a "concession" for the purpose. It will be seen ere long in what way this "paternal" power is exercised by the French Government.

In Austria, a law was enacted in 1860, regulating the formation and management of assurance funds, and providing for the calculation and preservation of the necessary reserve against liability, by rules so strict and cautious that in some cases the accumulation of funds may be even more than safety and equity require.

In the North German Confederation, at this moment, an interesting discussion is going on upon certain proposals for legislation, which will in all probability lead to a measure not only requiring publication of accounts, and the verification of the reserve against liability, but also lay down rules as to the manner in which that reserve shall be invested.

In America, legislation on the subject has gone to an extreme of interference and control. Every State has its own system, but in all of them a strict supervision is exercised. Actuaries are appointed by

Government to check the calculations and verify the reserve, and if any Company does not comply with the rules laid down for its guidance, it is liable to be suspended or stopped.

Life Assurance, by involving, as already explained, large payments in anticipation of liability, evidently presents, more than other kinds of business, temptation and opportunity of indulging speculative and fraudulent tendencies, where these exist in the parties intrusted with the funds; and the examples above cited are sufficient to show that in the opinion of practical men in various countries the natural liberty of contract, as regards Life Assurances, should be placed under some measure of regulation, for the safety and advantage of the public.

Now, Mr Cave's Bill proceeds on the principle of introducing into the law of this country the *minimum* amount of interference which can be suggested, by merely requiring every Company to furnish and make patent to the public sufficient evidence of its solvency, and of the fair and honest manner in which its affairs are conducted.* On that ground, and in accordance with a view which I have long held and advocated, I think the Bill is right in its conception and object, and deserves in the public interest, with proper amendment of details, to be heartily supported.

This Society will probably not care to enter upon a minute examination of the clauses and schedules of which the Act consists. These have been considered; and a variety of amendments in Committee will no doubt be given effect to, if the Bill passes this Session.

1. The deposit of £20,000, required by clause 3, on the starting of a new Company, is apparently not intended as a security to Policyholders, because it is to be returned after the Company has been fairly established. It is probably meant to operate as a check upon the formation of weak and speculative concerns without capital or connection to command a profitable business. That some such check is needed must be evident from the fact that some 200 Companies, established since 1844, have disappeared by amalgamation and winding-up, thus involving much loss, expense, and disappointment, which a check like that proposed might, in large measure, have prevented.
2. Clause 7 should be altered to allow existing Companies, which, according to their Deeds of Constitution, ascertain their reserve and divide the surplus at longer intervals than five years, to make the Investigation and Returns required by the Act at the same periods as are fixed by their deeds.
3. The Clauses as to Amalgamations, 12, 13, and 14, will be useful

* The returns required include—1. Annual Account of Receipts and Payments, showing Income and Expenditure under every head; 2. Annual Balance, showing Funds, Claims, and whole Investments suitably classified; 3. Actuarial Report and Abstract of Valuations,—showing Table of Mortality and rate of Interest used in the calculations,—method of Valuation—"Loading" thrown off in whole or in part,—also Surplus appearing, and how disposed of; 4. Details of whole Policies, or materials for checking Valuations.

to Companies unable to maintain a separate position; and as there may be some Companies so situated, the terms of the Clauses should be carefully considered by those who have any prospective interest in such Amalgamations.

4. By Clause 20, Policy-holders alleging insolvency may petition the Court for winding-up. This power is free from all reasonable objection. The Clause in last year's Bill, giving power to any twenty Policy-holders to petition the Board of Trade to appoint inspectors to examine and report upon any Company, was very properly withdrawn from the present Bill.
5. The Schedules attached to the Act might be framed in a more artist-like manner than some of them have been, and the purpose of the returns might have been quite as effectually served by requiring a great deal less of mere detail. Schedule 6 is particularly objectionable on this ground. It seems to be intended that each office, after giving in previous Schedules the *data* and results of their Valuations, shall, under this Schedule, furnish the whole materials for checking these valuations in detail. This will, in the first instance, involve enormous trouble to offices, especially those of old standing and large business. When it is supplied by the 113 offices now carrying on the business of Life Assurance in this country, the mass of figures deposited with the Board of Trade will be something quite unexampled. It will, I believe, be of no practical service except, perhaps, in a few cases, which might by other means be better reached than by such mountainous returns. The Schedule, in fact, seems specially contrived to give the greatest amount of trouble, with the smallest measure of utility.

Although the cases of the "Albert" and "European" are those which have chiefly caused what is called the Life Assurance panic in this country, they are by no means the only offices regarding which disquietude and suspicion have been excited. It is in the nature of a panic that exaggerated rumours are generated by it. I am far from adopting the wild statements of writers whose lack of information seems to be made up, for sensational purposes, by strong language. At the same time it is believed, by those who are best informed on the subject, that there are Companies still carrying on business which are not in a sound condition. It has been said that nine-tenths of the existing assurance contracts are perfectly safe. Assuming the total of these contracts to cover £400,000,000, and if it be considered that one-tenth of these or £40,000,000, is in the position described by the words "bad and doubtful," and form, as they do, the obligations of more than one-tenth of the number of existing offices, or say twenty in all, it is not surprising that many continue to call out for a more stringent measure than that of Mr Cave. It may therefore be proper to consider its probable effects if passed, and whether there is any real necessity for going further at present.

The system of secrecy as regards more essential facts, and display

only of those which are calculated to produce a favourable and often delusive impression, has been so long in force among Life Assurance Companies, and has led to so much disappointment and uncertainty, that a feeling has become pretty general that Life Assurance business is intrinsically so abstruse that no form of Accounts or Schedules which can be framed would be of any real service in disclosing the true position of offices generally, and that by a little ingenuity and ambidexterous manipulation of figures the whole object of the required returns may be effectually balked. Under this impression various suggestions have been made, such as—that some public officer should be appointed and specially charged with the duty of seeing that the various returns are properly made, and are kept arranged in a form to be easily available for public reference, or that suspicious Policy-holders should have power (as proposed in last year's Bill) to petition the Board of Trade to examine into the soundness of any office.

I believe that these and still stronger suggestions as to a complete system of Government audit and supervision (as in America) all originate in the idea that mere publication, such as the Bill seeks to introduce, will turn out to be of little or no value. Now, though Policy-holders and the public generally would not fully understand the returns made, yet these would contain the essential and testing facts of every Company's business and position. These facts being thus recorded, would without fail be immediately made known to the world. The actuarial profession, closely connected as it is with the various offices, would immediately become accurately acquainted with the real condition of every office carrying on business, and through them that opinion would immediately ooze out to the general business public, so that no person contemplating transactions with any particular Company could have the smallest difficulty in obtaining, at once, trustworthy information and advice regarding its financial position. In some cases the making up of the Returns alone might be the means of revealing to parties in responsible positions in Life Offices what was before unknown to them. In others, I believe that the passing of the Act would be quite enough. No attempt would be made to face the making of the required returns. In this way the "trade would be effectually weeded. The bad offices would be killed out, and the good ones left standing."* Even as regards good offices, the distinct information which would be given regarding all would be valuable and wholesome in a high degree. Economy would be directly and powerfully promoted. Invidious comparisons and unfair rivalries *inter se* would be discouraged, and the public itself would rapidly learn the important lesson,

* Early in 1868 I was desired to examine some of the published statements of the "Albert." Imperfect as they were, I had no difficulty in drawing the conclusion that that Office must then have been "irretrievably insolvent." I communicated a "confidential memorandum" on the subject to certain parties interested in the question of its solvency. I mention this to show that if under a fragmentary system of publication it is difficult, if not impossible, to conceal the unsoundness of an office, the exhaustive returns of Mr Cave's Bill would certainly reveal the true position of every Company.

not putting it too strongly to say, as in a prospectus of the Scottish Widows' Fund Society I lately did, "that just as depositors are entitled to draw the sum at their credit with their bankers, so Policy-holders closing their accounts with a Life Assurance Office ought to be held entitled to draw the sums standing at their credit, under an equitable abatement," for the reasons already explained.

The more I consider this point, the more I become astonished that, during the recent period of excitement, and amidst the superabundance of comment and suggestion which the "Life Assurance Panic" has called forth, the simple but thoroughly practical and, indeed, commanding principle now referred to has, as yet, received little or no influential recognition. If it were fairly represented in Parliament, I can scarcely doubt that its peculiar value and appositeness at the present crisis in Life Assurance affairs would be felt on all sides, and in that case a clause would, no doubt, be inserted in Mr Cave's Bill to give it practical effect. The advantages which would accrue from such an enactment may be summarized as follows:—

- (1.) It would form a practical test to the solvency of every office, and a considerable safeguard against any improper liberties being taken with the Reserve or "Assurance Fund," truly belonging to Policy-holders.
- (2.) It would very much supersede the necessity for any outside compulsory audit; and in the case of amalgamations it would form a more simple check and a more effective protection to dissenting Policy-holders than any which they now possess, or which the Bill in question proposes to confer. The helplessness of Policy-holders in view of proposed amalgamations, of which they may strongly disapprove, has been very forcibly dwelt on in late discussions. To make surrender value a legal claim would give the tangible remedy required to meet to a large extent the hardship of a case of which no other direct redress has been suggested.
- (3.) It would establish in every Company a well-understood standard of safety, to which all connected with the management would necessarily have their attention constantly directed. In fact, it would operate as a continued self-acting audit, which every Policy-holder could at his own hand instantly apply, when necessary, for the substantial protection of his individual interests.
- (4.) It would probably be a more efficient barrier against new Companies being started without means, and by undue expenditure, than the proposed deposit of a sum of money. Business could only be secured by showing proper surrender values, and the necessity of being prepared to meet emerging demands, according to a fixed scale, would effectually restrain young offices from that system of expenditure and speculation which has ripened so many Companies for amalgamation and winding-up.

I may add that in good offices the "proportion" of the sum allowed on surrender, may be said to vary from 60 to 80 per cent. of the reserve or sum actually retained against liability. It is more or less, in certain exceptional classes of assurance, according to well-known rules of calculation. The main provision of the enactment now recommended might be very easily framed, and would apply to probably nine-tenths of all Policies now subsisting. Exceptional classes could be dealt with by special provisions. Offices might have the right to vary the proportions to be allowed according to their own views and the systems of business on which they proceed. Only let the proportion of the Value retained against Liability allowed on Surrender, and the amount thereof, be specified.*

THE ABOLITION OF FEUDAL TENURE BILL

At the time when we go to press, we are still without the amended edition of the Lord Advocate's Land Tenure Bill, and we think it therefore better to reserve our comments on the Bill itself till next month. The original Bill has been so fully discussed by the various legal bodies, that we have much hesitation in loading our pages with objections, or pleas in defence which must already have been anticipated in the conclaves which, in every corner of the land, have sat upon the Bill. We think, however, that it cannot but be useful to recal to the minds of Scotch lawyers the third Report of the "Commission appointed for Inquiring into the Courts of Law in Scotland" in 1837. The Commissioners were—Professor G. J. Bell, Sir John Campbell, Solicitor-General Cuninghame, Messrs Jas. Reddie, Andrew Rutherford, Adam Anderson, J. E. Drinkwater Bethune, Wm. Bell, and John Dundas. The third Report was issued after a very full inquiry, on 13th January, 1838, for Royal Commissioners moved more rapidly in those days than they do now; and it contains the germ of all the conveyancing reforms that have since been effected. All its recommendations have now been carried out, except, we think, the recommendations that powers should be given to vassals to compel the commutation of casualties, and that a purchaser's title should be complete by the operation of law whenever he records his conveyance, without the necessity of resorting to the superior for an entry. The chief issue submitted by the Lord Advocate, not to the decision of a Commission, but to the deliberate consideration of the legal profession and of Parliament,—an issue of great importance, and one upon which we do not understand the Lord Advocate himself to have

* Mr Cave has given notice of an amendment requiring a return of "Minimum Values allowed for Surrender." But this, I need scarcely say, does not approximate either in form or substance to the remedy now suggested, under which every Policyholder would have a legal right to a defined proportion of the sum retained to meet the liability on his Policy

formed an irrevocable opinion, although he has thought it right, by the original form of his Bill, to take the opinion of the public upon it—was carefully discussed by the Commissioners of 1837, and many valuable opinions were given to them by experienced lawyers and legal societies. All that we propose to do at present is to reprint some passages from the Report from which it may be seen why the Commissioners unanimously negatived the question, whether the Feudal relation should cease to exist; and how they wished the Feudal relation to be simplified, so far as that has not been done upon their recommendation.

The ground on which they advocate the retention of the Feudal Tenure is exactly that on which many might be disposed to prefer an allodial system—the freedom and facility which it allows to private contracts. They say, after a lucid explanation of the principles of the system of land-rights in Scotland,

“Laying out of view the difficulties which arise from the necessity of the superior's concurrence in every transmission of the estate to an heir or donee, and generally, in every renewal of the investiture, it seems plain, that while no system of land-rights can exist without written titles, the system which prevails in Scotland, resting upon the simple relation of superior and vassal, admits of the creation of every variety of estate and reserved interest in the land. In the original constitution of a right of property, the Crown, or any subject superior wishing to convey the property by a subaltern holding, has the power, quite consistently with the relation which constitutes the basis of the system, to affect the grant by any limitations and conditions, reserving to the superior a larger or smaller interest, restricting the enjoyment of the vassal, regulating his succession, and, consequently, the descent of the feu, or imposing upon it burdens in favour of third parties. Thus, if an entail is made in an original feu, the superior gives out the lands to be holden of himself by the vassal and a series of heirs nominated in the grant, who take the estate successively by virtue of the grant; and to render it effectual, the grant contains restrictions against selling, contracting debt, and altering the order of succession, with irritant and resolutive clauses, which, as conditions of the grant, operate as a restriction of the estate conveyed. The same thing may be said of the creation of estates of life-rent and of fee, of burdens in favour of third parties, and of limitations upon the use of property, which the superior may often have an important interest to enforce; as where he fees out ground for the purposes of building. In the person of the heir, the investiture should be renewed without change—a change of investiture being properly accomplished through disposition by the vassal, in his own favour it may be, or in favour of a third party. But the system is just as flexible and accommodating in the case of transmission by disposition of the vassal, as in the case of original grant. Every such transmission is ultimately effected by grant from the superior, who is now compellable at law to receive a resignation of the vassal's estate, and make a new grant of it, under such terms and conditions as the vassal in his procuratory of resignation shall prescribe. The vassal's resignation, of course, cannot include more than his right and interest in the lands; and the superior, therefore, is always entitled to insert in the new grant those qualifications, which for his interest were introduced into the original grant, and to object to the insertion of others inconsistent with his rights.

“With reference to some remarks we shall have occasion to make in the course of this Report, it should be observed in passing, that the conditions and limitations which qualify the vassal's right occur only in the vassal's titles. The superior's titles are silent on the subject, for the plain reason that he is understood to have the whole estate before he diminishes it by grant. His right may

be restricted as against his own superior; but if there be no restriction in favour of his superior, he will appear to be infeft, like the superior, absolutely in the lands; and this gives great simplicity to his titles, because a large estate held by numerous feuars will be transmitted as easily and simply as if it had remained in his immediate possession. The separate feus do not constitute distinct estates in his person. They are regarded in law as burdens merely on the estate as he originally held it, and before it was feued out.

"The reservations made by the superior in his own favour, when constituting a feu, appear only in the titles of the feuar. Wherever, therefore, a superior is required to act, in order to complete the titles of an heir or disponent, he has an opportunity, as he has an interest, to ascertain that the feuar's titles, then passed under his revision, are completed in terms of the original grant. In other cases, as where property is feued out for building with a great variety of restrictions for the mutual benefit of the feuars, those feuars, even where they have a direct action to see that the rights of the others remain duly burdened in their favour, generally trust to the superior and his right and power of control, to see that the separate titles of the different feuars retain the qualifications which are required for their common interest, and consequently for that of the superior.

"The simplicity of the system thus briefly explained—the well understood and clearly defined relation on which it depends—renders it eminently capable of adapting itself to every purpose which can be required in the constitution, transmission, or enjoyment of an heritable estate; and experience accordingly has shown that there may be engrafted upon it every modification necessary to meet the exigencies of the most advanced state of society."

The Commissioners then proceed to point out the difficulties which arose in transmitting estates in land, from the necessity for the superior's actual concurrence in every renewal of the investiture, aggravated as they were by the refinements and subtleties generated under the old system of the elective franchise, and of the remedies which the law furnishes to the superior and vassal respectively for the protection of their rights. Then they continue:—

"In this rapid survey we have attempted, however imperfectly, to explain the manner in which the principles of the feudal system still affect the land rights of Scotland, through the various and complicated forms which these have assumed. We have already observed that the simplicity of the relation, generally considered, of superior and vassal, and the facility of ingrafting upon it and modifying it by conditions of every description, narrowing or enlarging the estate reserved, and affecting, in a corresponding degree, the subject of the grant, rendered it peculiarly fit to serve as the basis of a system of real property; and though adopted, not from any prospective views of legislative policy, but because it was established, and was found capable of accommodating itself to the diversified uses and enjoyments of property requisite in a manufacturing and commercial community, we have great doubt whether, in the whole matter, independently of the evils attending every extensive change, any system could be substituted really capable of greater simplicity and security than may be attained under the existing one, when it shall have received the improvements of which it is susceptible. The introduction of any new system of real property, founded upon different principles, and necessarily reaching in its operation every right and estate in or connected with land, would be attended with consequences which no man of experience and reflection could contemplate without the greatest apprehension. It would, unavoidably, in the first instance at least, introduce great insecurity, and still more a feeling of insecurity with regard to property the most valuable, shake men's confidence in the most important transactions of life, and for years surrender them and their estates to courts and lawyers. It is very fortunate, however, for this country, that whatever defects there may be

in the present system, and however necessary its amendment, we are under no temptation of hazarding for this purpose any violent or fundamental change; which could only be suggested in ignorance of the capacity of the existing system, or in a rash desire to adopt principles, which in different circumstances may have become established in other countries, but which, if they are of more apparent, will not be found to be of more real, simplicity and certainty."

They then consider proposals to obviate the defects of the existing system by prohibiting subinfeudation and converting the existing estates of superiority into real burdens on the property. They had considered almost all the points that have once more been discussed with so much ingenuity and assiduity by all the legal societies of Scotland, and we do not think that the objections to the annihilation of the superior's estate in the land have yet been more forcibly stated:—

"The great complaint at one period was, that the rights of the superior were evaded, his connexion with the property being lost by the interposition, between him and the proprietor, of several nominal estates of superiority. This objection, after all, was not of great weight. Where the estate of superiority was worth anything, either by its regular *reddendo*, or by its casualties, the superior could scarcely suffer prejudice. Unless he had been a party to the subinfeudation, he was entitled to disregard it, and had all his remedies against the estate, within the years of prescription, as if it still remained in the person of the vassal; and even prescription, if it did not proceed upon a title inconsistent with, and exclusive of his, could affect only the duties and casualties remaining forty years unlevied, or those conditions and qualifications which were not natural or essential to the estate. The complaint, however, which is the modern one, is much better founded. It comes in the opposite direction, namely, on the part of the proprietor. His, in truth and substance, is the more valuable estate, and he has a very obvious and substantial interest in the amendment and correction of any system, the practical effect of which is to introduce great expense, or what is worse than expense, great uncertainty in the means of completing his title. Whether from the one view or the other is of little importance, a proposal was made, in the middle of the seventeenth century, and upon the high authority of Lord Stair, to abolish by statute all subinfeudation, with the exception only of subinfeudation by the immediate vassals of the Crown; that the tenants *in capite*, in short, should be the only subjects superior; that all the proprietors or holders of the *dominium utile* should hold directly of them, and that any intermediate estate of superiority then in existence should be valued and converted into an annual rent, for which the proprietor was to grant security, in ordinary form, to be holden of his superior. There cannot be the least doubt that this scheme would have materially simplified our land-rights in their constitution and transmission; and the circumstance of that great lawyer having suggested so strong a remedy as that of prohibiting subinfeudation in future, and extinguishing the existing estates of mid-superiority by converting them into annual rents, proves the inconvenience which even then was found to arise to the superior, as well as to the vassal, from the excessive multiplication of such estates. If we saw no other means of improving the present system, we might feel ourselves called upon even at this advanced stage of society, and where property in land has been much more subdivided, and made much more matter of commerce than in the middle of the seventeenth century, to consider the suggestion of Lord Stair, with a view to its practical adoption.

"Various reasons, however, have led us to reject any such scheme. In the first place, we are of opinion that the law, as it exists, and admitting subinfeudation to any extent, where subinfeudation is really made for the purpose of reserving to the superior an estate of substantial value, may be so ordered, without departing from its true principles, as to remedy in a great measure the evils which have been hitherto complained of. These are not necessarily the conse-

quence of subinfeudation, though they affect the estates which are constituted by subaltern holdings.

"In the *second* place, it seems very plain, and is allowed on all hands, that no system in which subinfeudation is actually prohibited could exist or be carried on with advantage to the country, or rather without great detriment, unless a system of leasehold were introduced as a substitute for subinfeudation. The exigencies of society, the increasing commerce in land, the various interests and estates in it, which the different relations of a manufacturing and commercial community require, all render necessary the power of reserving an estate in land, while the property is given to another; and if the means of accomplishing this be not permitted by subinfeudation, as with us, it must be accomplished by a system of leasehold, as in England.

"In the *third* place, we think the most serious inconvenience would arise from compelling that to be done by lease which is now done by feu. The tenures of feu-holding and blench-holding in this country are well known; the deeds by which they are respectively constituted are familiar; their meaning and operation are clear and well defined—fixed by institutional writers and the judgments of the Court, and—better perhaps and more satisfactorily—by the universal understanding and practice of the country. Our system of records, too, is adjusted with reference to land-rights, as constituted by the tenure of feu-farm and blench-farm, and to the mode in which titles are respectively completed in the persons of heirs and singular successors. If a tenure by leasehold were introduced, a new system of records would be necessary, and a change so extensive in the whole system that its effects could not be clearly foreseen or anticipated; and nothing but necessity, or very obvious expediency indeed, would justify the experiment. We see no such necessity or obvious expediency as should lead us to displace the feu, in order to substitute the lease; the more especially, that the feu in its own nature is little more than a perpetual lease, or a lease renewable for ever upon the payment of a moderate fine; and that, by introducing a system of leasehold, admitting of leases renewable for ever and of sub-leases to any extent, we should be changing a name merely, while we imported into the system all the existing difficulties, and perhaps other and greater difficulties, and rejected a right with which the law and the people have for centuries been conversant—thus losing all the advantage which can be derived from a matured system of jurisprudence.

"*Fourthly*, and this is a consideration not lightly to be overlooked, a lease, for any term of years especially, would not be acceptable in this country, as a substitute for a feu. It is in vain to refer, upon a point of this kind, to the calculations of mathematicians as to the comparative value of a perpetual right, and a right having an hundred years to run. The feelings of the country do not correspond with the result of such a calculation. It would be considered a grievous hardship to convert feus into leases of an hundred years; and it would, it is believed, diminish the value of property intended to be disposed of for building or for small feus, if, in place of the understood and favoured right of feu, the law were to force upon the parties the less understood and less acceptable right of lease.

"*Fifthly*, the conversion of the existing estates of superiority into real burdens, so as to preserve, in all time coming, until duly extinguished, their proper order of preference, as in competition *inter se*, as well as in competition with other real burdens already established on the property in favour of third parties, would be attended, in practice, with great difficulty, uncertainty, and expense.

"In the *sixth* place, the superior's interest, in many cases, consists, not so much in the certain or contingent pecuniary profits of the estate, as in the conditions and limitations which he has imposed upon the right of the vassal. We have an example, in the restrictions usually imposed, where ground is feued for building. This interest of the superior could not be valued so as to be converted into an annual rent, and could not be discharged without serious prejudice to the most important uses of property.

"*Lastly*, the scheme necessarily implies a renewal and reconstruction of most

of the title-deeds of the country. Scarcely any estate would remain on its present footing, the proprietors becoming the immediate vassals of the tenants *in capite*, and all the intermediate superiors being converted into bondholders. Besides, where the immediate vassal of the Crown had no interest to complete his title, as would often be the case, the proprietor would be under the necessity of resorting to the Crown, and, necessarily, at an expense which would press hard upon the smaller feus.

"For all these reasons, and, above all, because we think the objections applicable to subinfeudation may be alleviated, if not entirely removed, we are humbly of opinion that no good reason can be shown for prohibiting subinfeudation, accompanied, as such a prohibition must be, with the introduction of a system of leasehold."

The chief remedies which the Commissioners propose for the inconveniences of the old system are the two which have not been carried out by the Acts of Lord Advocates Rutherford, Inglis, and Moncreiff, and which it may be the mission of Lord Advocate Young now to achieve—viz., to enable the title of heirs and singular successors to be completed without the actual concurrence of the superior, by implying that concurrence and holding it by force of law to have been given at every transmission, and the commutation of casualties. They say:—

"This will not affect the relation of superior and vassal. It will leave with the superior every active remedy which he now possesses. He may still, if the holding be feu, bring his declarator of irritancy *ob non solutum canonem*, or render effectual his feu duties by poinding of the ground. He has still his personal action against the vassal and his heirs, or against singular successors, intermitting with the rents of the subject or estate. He may still proceed by declarator of non-entry, and so force payment of his relief or composition. All these, and any other active remedies he possesses, will remain with him, because the relation of superior and vassal will not be disturbed; on the contrary, as the infeftment of a third party will be held an infeftment confirmed by the superior, his remedy against the disponee will be more direct and complete than as it now exists. This indeed gives rise to an interest which it will be necessary to guard against in introducing the change, namely, that as his rights now stand, the superior cannot demand composition from a disponee while the vassal disponer lives, because, until his death, he cannot compel an entry, the fee till then being full; while, if the disponee's titles were held to be completed under the superior by his infeftment without charter, the superior, if it be not otherwise provided for, would have an apparent claim for composition where none now exists.

"The last consideration leads us to remark that the superior's right to composition, and to the casualties of superiority generally, should not remain on its present footing. It would plainly be of great advantage for all parties to commute those uncertain and contingent profits of the estate, either for a price or for an annual payment. Where they are of small value from their being already taxed, or from the nature of the estate otherwise, a compulsory sale would be the better arrangement. Where they are of greater value, such a sale might in some cases be a hardship, to the vassal especially; and the advisable course would be, if the vassal refused the purchase, to convert them into a feu-duty, changing the tenure into feu where it was blench, or adding to the feu-duty where the tenure was already feu. In so dealing with these rights of superiority, we follow the analogy furnished by Legislature in the middle of the last century, when the tenure of Wardholding was abolished, and alterations made in the tenure of feu by discharging the casualty of marriage where it had been attached to that holding, and also clauses *de non alienando sine consensu superiorum*. The Legislature accomplished that change, more immediate perhaps and extensive than any which we

here contemplate, by converting into an annual payment the superior's interest in the abolished casualties. The rate of conversion was adjusted in the Court of Session. A similar course should be adopted in commuting the casualties which still belong to the estate of superiority, with this difference, that where they are not of such amount as to justify conversion into an annual *reddendo*, they should be at once discharged upon payment by the vassal of their estimated value. The estate of superiority, reduced by such a price to a mere nominal estate, ought in some cases to be extinguished. If, on the contrary, it was of such value as to admit of being converted into a feu-duty, it is plain that the parties would be brought into constant and immediate contact, a circumstance not to be overlooked in considering some of the objections which may be opposed to the suggestions we shall have to make.

"The introduction of casualties, by stipulating for fines on the transmission of the vassal's estate, should be prohibited in future, so as to reduce the superior's interest to an annual return."

Some further extracts, containing answers to objections, we intend to give next month.

Reviews.

Shelford's Law of Railways: containing the whole of the Statute Law for the Regulation of Railways in England, Scotland, and Ireland: with Copious Notes of Decided Cases upon the Statutes, Introduction to the Law of Railways, and Appendix of Official Documents. Fourth Edition. By W. CUNNINGHAM GLEN, Barrister-at-Law. In Two Volumes. London: Butterworths, 7 Fleet Street. Edinburgh: T. & T. Clark; Bell & Bradfute. 1869.

Shelford's Law of Joint-Stock Companies: containing a Digest of Case Law; the Companies' Acts 1862; the Orders made under these Acts to regulate Proceedings in the Court of Chancery and County Courts, and Notes of all Cases interpreting the above Acts and Orders. Second Edition, much enlarged, and bringing the Statutes and Cases down to the date of publication. By DAVID PITCAIRN, M.A., Fellow of Magdalene College, Oxford, and of Lincoln's Inn, Barrister-at-Law, and Francis Law Latham, B.A. Oxon, of the Inner Temple, Esq., Barrister-at-Law; Author of "A Treatise on the Law of Window Lights." London: Butterworths, 7 Fleet Street. Edinburgh: T. & T. Clark; Bell & Bradfute. 1870.

ALTHOUGH Mr Glen has retained the respectable name of Shelford, and has adhered to Mr Shelford's plan, the work which he offers us is substantially a new one. No branch of law has grown so rapidly, at least in bulk, as the law relating to railways. Even the third edition of Shelford was of a very different size from the first; but the growth since then has been greater than ever. The third edition contained 868 pages, and referred only to 81 cases, while the present work has swelled to two volumes, royal octavo, and its index refers

to not fewer than 2280 cases. When George Stephenson was improving the steam locomotive, he little dreamed that it would produce in forty years a mass of law filling, even in a condensed form, two such volumes as these, and occupying, as some one has calculated, one-fourth of the whole time of the Equity Court of England.

As railway law is really the creature of statute, the method adopted in the work is both the most natural and the most convenient. It consists, as Mr Glen says, "in bringing together in a systematic form the whole of the statutes relating to the law of railways, and the authoritative expositions of those statutes proceeding from the Judges of the Supreme Courts of Law and Equity." The statutes are now both numerous and bulky, there being 98 unrepealed public Acts applicable to this subject since the passing of the first subsisting Act in the first year of Her Majesty's reign (1 Vict., c. 83). The two volumes before us have for their subjects respectively the two great classes into which these Acts may be divided: the first embracing all the statutes which directly apply to every railway, and the second embracing those which are made applicable by adoption in the special Act. "The several classes of Acts, in each volume, are arranged chronologically, with the decisions upon each immediately following, so that everything bearing on the particular statute is brought at once and directly before the reader." So complete is the collection of statutes relating to railways, that we find in it not only Lord Campbell's Act enabling compensation to be recovered in respect of persons killed or injured by the fault of another,*—the Tramways Act and the Clearing-house Act—but also the Telegraphs Acts of 1863, 1866, and 1868, and even the Cattle Plague Act, 1869, so far as it concerns railways. It may be worth mentioning that the Acts relating to preliminary proceedings and the formation of companies are all given, including the Acts for the Taxation of Bills of Costs in the Houses of Parliament. The law as to the assessment of railways to local taxes forms a special portion of the work, and deviates from the plan of printing the statutes at length with the judicial decisions in the form of notes. Much of the law on this subject consists of judicial decision applying statutes affecting all property to the peculiar case of railways, and Mr Glen, whose previous works have given him a considerable authority in regard to questions of this kind, has given a full but concise statement of the general law on the subject, and a summary of the decisions as to railways. Especially in regard to the assessment of railways to poor rates will the information be found valuable to the English lawyer. In Scotland we have been more cared for by the

* Under this Act (vol. i., p. 95) and the 89th section of the Railway Clauses Consolidation Act (vol. i., p. 623) are gathered together all the decisions relating to personal injury, including questions of contributory negligence and the negligence of servants. A critic, otherwise very favourable to Mr Glen's book, thinks it would have been better to bring all these cases under one head; and we confess that there is a little repetition. But we are bound to say that in our own experience we have already found the analysis of the cases thus given extremely useful.

legislature (whether altogether wisely, is at present a question before Parliament and the country); and our statutes and decisions have been well reviewed by Mr Guthrie Smith in the second edition of his Treatise on the Poor Law, to which Mr Glen refers. But it is right to note that in this as in all branches of his subject the editor has not forgotten us, but gives not only the statutes but some account of the general law. It is to be regretted that his references to Scotch cases are meagre and unsatisfactory. The Appendix of volume first contains, *inter alia*, a model Railway Bill, a Table of Parliamentary Costs, and a variety of other forms required in applying for Bills and other railway business, making the book not merely valuable to the lawyer, but indispensable in every Railway Company's office. The railway secretary who has not Glen's Shelford is only half-qualified for his office.

Prefixed to the first volume, is a *resumé* of the history of railway legislation, taken principally from the Report of the Royal Commission on Railways (1867).

The second volume, which contains the Consolidation Acts for all the three kingdoms, will be extremely valuable to the Scottish lawyer, who has not generally a complete collection of English Reports, for its full notes of almost all important decisions on the construction of the Acts. The Scotch Acts are given of course; but, unfortunately, Mr Glen has not added the construction of them by the Courts, as he has so admirably done for the English Acts. Of course where the latter coincide with the Scotch statutes, the decisions of the English Courts give valuable and authoritative interpretations for us also; but the judgments of Scotch tribunals are, of course, an important desideratum in a book intended for use north of the Tweed. Mr Glen, who has done so much so well, cannot be blamed for omitting what would have been a serious addition to his herculean task; but it might have been possible to get a Scotch lawyer to annotate the Scotch portions of the work. Even now we suggest that a Scotch supplement to Shelford would be a valuable contribution to our law libraries.

The typography of the book is admirably clear, and there is an ample index to each volume. That the practitioner might find the latest additions to the law within the compass of these two volumes, care has been taken to add supplemental notes of the latest decisions of last year, and of the statutes of 1869 as to railways.

The other work, whose too copious title page is placed at the head of this article, does not deserve the same high commendation. It is indeed a useful summary of Company Law; but it is neither so skilfully compiled nor so exhaustive and complete as Mr Glen's work. Not only do we find instances of considerable carelessness or haste in the language, but some statutes have been in a very extraordinary manner overlooked. Thus the Industrial and Provident Societies Act (1862) is given with some annotations, and apparently held out as the subsisting Act on the subject, whereas five sections and part of a sixth section of that Act were repealed, and important new provisions enacted

by the Amending Act, 30 and 31 Vict., c. 117, the existence of which appears to have remained unknown to the editor. Many cases are not noted in the text which have been decided during the last three years, although some of these find a place in the addenda. As an example of hasty writing, take this sentence which occurs in a note upon Formalities in the Management of Companies: "As directors and others who, from their position, can tell whether formalities are duly observed, presumption of such observance will not be made in their favour."

Notwithstanding the existence of these defects, the book possesses many good qualities, and will be found practically useful to persons engaged in the formation or management of companies, as well as to lawyers.

The Month.

Sir W. Gibson-Craig on the Insubordination of the Lord Advocate.
 —To most members of the legal profession the lament of this gentleman, uttered at the Midlothian County Meeting (and believed to have been rehearsed on various semi-public occasions) will be interesting and instructive. Some years ago, it was the misfortune of Liberal Lords Advocate to be too much trammelled by the leading strings of two or three persons in Edinburgh, and as much power to make or mar a man or a bill was understood to reside in some back streets in Edinburgh as in Downing Street or Whitehall. The suspicion was that certain wire-pullers, invested with no responsibility to the public, had more weight with the Lord Advocate of the time and with the Government than was consistent with constitutional principles or the public interest. We rejoice to learn from the lamentation in which Sir W. Gibson-Craig has just given vent to his feelings, that the present Lord Advocate has rebelled against the tutelage under which the country and the profession has groaned; and that he has resolved, in legislative matters, to be guided by the lights of his own understanding and the free and openly expressed opinion of the country at large. In doing so he is certainly exposed at the outset to the risk of falling into considerable error in matters of detail—for a Legislative Committee, or staff of competent draftsmen, cannot be improvised, and no one man who has the work of a Lord Advocate to do can personally draw or even thoroughly revise all the details of Scotch bills on important subjects. But we do not understand how Sir William Gibson-Craig can pretend that the old system of drawing bills was any better than the worst substitute for that system which the Lord Advocate can find. At the meeting referred to, the distinguished Lord Clerk Register

"Entered his protest against the manner in which the legal business of Scotland

had been for some time conducted. He recollected when that business was conducted by two of the greatest and most successful legal reformers Scotland had ever known—he meant the late Lord Rutherford and the present Lord Colonsay. The system then pursued was that whenever the Lord Advocate had a legal bill in contemplation, *every person of the legal profession in Edinburgh, whose judgment was worth having*, was confidentially consulted about it. The advice and opinion of the members of the Bar, of the Writers to the Signet, and of the Procurators was always most carefully taken and weighed, and *one of the ablest of those gentlemen was employed to draw the bill*. After that had been done, the bill in proof was submitted to those gentlemen, and generally to the legal profession; so that every care was taken that no innovation should be made upon the law which was not perfectly safe and well considered. The consequences had been that the greatest and most important reforms yet made in the law of Scotland were carried through by the two gentlemen he had named, and there was not one of those reforms which had not received universal approbation. What he now entered his humble protest against was, that for a considerable time the preparation of Scotch legal reform bills had been a mystery. No one had ever been aware that the changes they proposed were in contemplation. Here were two bills of the very greatest importance—the Land Tenure Bill and the Entails Bill—which had been received with very great surprise by the legal profession. In regard to the former, he believed, there was not a clause in it to which the best legal authorities in Edinburgh had not objected, and from what he had seen of the Entails Bill he thought it would be still more objected to, as going against all the recognised principles on which such a subject ought to be dealt with. He did not believe such a mode of carrying legal reforms was ever known in England or Ireland. But at all events it would be of small importance in England, because there were a great number of English lawyers in Parliament who could take care that the bill was in proper shape. In the case of Scotland, however, the Lord Advocate was generally the only Member who was a lawyer, and therefore that gentleman had the whole matter in his own hands. At the present moment, by accident he might say, the Dean of Faculty was in the House of Commons, and Lord Colonsay, also by an accident, in the House of Lords; but, generally, there had been no member of either House that could discuss a Scotch legal bill with the Lord Advocate, or make the House aware of the danger of the reforms or innovations proposed. From what he had seen of past legal legislation, and what he saw in regard to the bills now before the Commissioners—two of the most dangerous bills ever introduced into Parliament—he did not think it was foreign to the duty of the Lord Advocate to take the best advice he could get. While very unwilling to make the statement he had done, he had felt so strongly on the subject for a length of time that he could not resist the opportunity of recording his objection to the system the Lord Advocates of late had been pursuing. He was sure it was the kindest thing he could do towards the Lord Advocates themselves, because he wished to save them the mortification of seeing their clauses pulled to pieces *by men who would have prevented the errors complained of if they had been consulted*."

The passages which we have italicized show, we think, the grievance which has given rise to this tirade. They say in effect,—
"We have not been consulted, and therefore the bills are bad: we are the men, and wisdom will die with us."

Although we are charmed by the frankness with which Sir W. Gibson-Craig, as the mouth-piece of the lately dominant clique, lays bare their wounds and claims the sympathy of the Midlothian Commissioners of Supply, we are compelled to say that his statement as to the former mode of conducting Scotch legislation is rather misleading. So experienced a politician ought to have known that no bill has been, or

could be with any propriety, submitted by a Lord Advocate to the criticism of the legal profession before being laid upon the table of one of the Houses of Parliament. It is competent, indeed, and expedient for any Lord Advocate to avail himself of the experience and practical sagacity of members of the legal profession; but his doing so or not is entirely in his own option, and it is also a matter for his discretion who and how many shall be consulted. A new Lord Advocate appears to us to exercise a wise discretion in this matter, when he refrains from consulting those whose advice in the past has produced imperfect or makeshift enactments, and whose political wisdom is displayed in a public lamentation over his neglect.

Sir D. Wedderburn on Procurators Fiscal.—We were greatly disappointed when we read that so able and enlightened a member of Parliament, and one who is (or was) a lawyer of sane and vigorous mind, had exhibited that too frequent form of mania which consists in demanding public inquiries into matters about which every one is already fully informed. Nothing in the recent conduct of our legal M.P.'s has so much distressed us—except, indeed, the appearance of Mr Dingwall Fordyce's name on the back of the miscalled Bill for the Abolition of Church Rates in Scotland, about which the less we say the better. The information required by Sir D. Wedderburn is, as the Lord Advocate pointed out, quite accessible to every one who is interested in the conduct of criminal prosecutions, and a select committee could add nothing material to the mass of evidence on this, among other subjects, which has been gathered together by the Royal Commission on Law Courts. Honourable members ought really to remember that, taking into account the cost of production, the public revenue is not likely to be increased by the largest sale of blue books that can reasonably be expected to take place in our day. In the present case ample materials for forming a judgment as to the system of public prosecution in Scotland already exist, and the debate on Sir D. Wedderburn's motion for a Select Committee itself shows that the Lord Advocate is fully prepared, except perhaps on one point, to take any suitable opportunity of amending such defects as may be found. His lordship has emphatically condemned the system of private inquiry behind the back of the accused person, a system which is somewhat alien to the genius of our Constitution, but which in Scotland is not at all disliked or distrusted by the persons most interested, and which has often the advantage of saving an innocent man from the annoyance of a public investigation into a false charge against him. Upon the question whether a procurator fiscal should be allowed to take private law business, the Lord Advocate's distinct and strong expression of opinion should put a stop to clamour for some years. No one can doubt that the appointment of a clerk or a policeman to conduct the delicate inquiries which form much of the business of procurators fiscal, would be no gain to the State either in economy or efficiency; and it is quite clear that the office would tend to fall into the hands of such persons, if the holders of it were forbidden to

take private civil business. If such a proposal were adopted, as the Lord Advocate mildly phrased it, "the quality of the procurators fiscal would be very much deteriorated." But this would be nothing to the class of legislators who are always proposing that public officials should be restricted to their public duties, and however ill-paid or lightly worked, should be prohibited from improving their fortunes or positions by other employment. Some such noodle will one day or other propose, probably in a town council, that a law should be enacted forbidding all persons in the service of the State or any corporation or burgh, to write books or spend their leisure time in any useful occupation.* Sir David Wedderburn assuredly does not belong to this class of legislators, and we are sorry that he has been led away even this once by their viewy nonsense. His speech was as good as could possibly have been made on such an argument; but the worth of the argument, we must confess, appears to us trivial.

On one point we venture to differ from the Lord Advocate and to agree with Mr M'Laren, who spoke in the debate; and on another point, though it does not affect our opinion on the question at issue, we think that Sir David Wedderburn deserves thanks for calling attention to a very glaring and mischievous anomaly in our administrative arrangements. The appointment of procurators fiscal by the Sheriffs of counties is a curiosity of constitutional law which, like the double sheriffship itself, is defended and is defensible only because it is. If it had not been the rule in Scotland for generations, no one would now think of conferring that piece of patronage on the Sheriff, any more than he would think of creating a local Judge for the sole purpose of looking after another local Judge. The procurator fiscal is a state official, subordinate to the Lord Advocate as the public prosecutor for Scotland, and he ought to be appointed by the Lord Advocate or the Home Secretary, who are responsible to Parliament for the efficiency with which criminal prosecutions are conducted. In theory these prosecutions, or rather the inquiries which precede them, are conducted by or under the authority of the Sheriff, who is in many cases also the Judge before whom the inquiry is brought to its final issue. But in every one case but one in a thousand this is merely a theory, and the Sheriff knows nothing of the case till the accused person appears before him at the bar. If it were otherwise, that is to say, if the theory were a reality, we should think it a scandal to our constitution that the Judge should also be the prosecutor, and we should demand an immediate reform. Some Sheriffs and greater men find pleasure in calling the procurator fiscal "the hand of the Sheriff," in

* This is generally put on the ground that the public, which pays, should get the full amount of service paid for. But such suggestions are too often mere ebullitions of that love of power which is reprobated in a despotic monarch, but is indulged in without remorse and without reprobation, sometimes with applause, by any small spirit that accident, intrigue, or impudence has raised to the rank of a bailie, or a town councillor. We are far, however, from saying that every bailie or town councillor has a small spirit or has been so raised.

the investigation of crime. In truth, he is the hand of the Lord Advocate and his deutes in Edinburgh, and it would be more in accordance with the logic of facts as well as with the principles of constitutional government if he received his appointment from the national government and not from the local Judge.

The Salaries of Local Judges in Scotland.—In support of his contention that procurators fiscal ought not to be allowed to engage in private practice, Sir David Wedderburn urged that even now their salaries are generally as high as those of the Sheriffs, and therefore were large enough without the emoluments of legal practice. He says :—

“The total expenses of criminal procedure in Scotland is £76,000, and of this sum the salaries of the Procurators Fiscal amount to about one-third. These salaries are supposed to cover those cases which are actually reported to the Crown Counsel, and which are brought to trial. Although the salaries of the Procurators-Fiscal are equal in amount to that of the local Judges, they are entitled, besides receiving their salaries, to pursue their own private practice; and it is worthy of observation that whereas the salary varies from £2000 a-year down to £50 a-year, they, as a rule in all country towns, and in counties generally, make considerable sums by their private practice as lawyers, agents, and factors, and in various other ways. Now, it appears to me that where a Judge is able to devote the whole of his time and his talents to the public service for a certain fixed salary, the public prosecutor, who can scarcely be said to move in a higher social position, might well, for a similar amount, devote the whole of his services to the public.”

We hope that Sir D. Wedderburn, the next time that he addresses his mind to the subject of Sheriffs' salaries, will just consider whether the fact that “the salaries of the procurators fiscal are equal in amount to the salaries of the local Judges,” really shows that the former are sufficient without private practice, or that the latter are infinitely too small to enable Judges to live in comfort and decency. Some people in Edinburgh are disposed to think that the salaries of Sheriffs-Substitute are ample enough for the offscourings of the bar who have been content to accept such appointments. But the number of such persons is steadily decreasing; and in a few years it will probably be the general opinion, even in the purlieus of the Edinburgh Courts, that such salaries should be attached to our local Judgeships as will make all of them desirable appointments to others than the weaklings of the bar, and will get them filled by men who are regarded by those who practise before them with other feelings than mild contempt or sublime pity. But for £500 or £600 a year, what can be expected? And we may thank our stars that in so many cases in Scotland we have got competent and accomplished gentlemen to act as Judges for salaries which many a thriving advocate's clerk would reject, and for which no English barrister has as yet been asked to do the much less important and less burdensome work of a County Court Judge. Even in important places such as Glasgow, Aberdeen, Paisley, etc., the salaries of the Sheriffs-Substitute are utterly inadequate, and for some time it has only been possible suitably to fill up vacancies in such places, because

of the general belief that a large and early augmentation of salaries was certain. We trust that some means will be taken to do this before any Judge entirely breaks down under the burden of arduous work and anxiety for an unprovided-for family.

The Expected Little Sheriff Courts' Bill.—The Lord Advocate's Bill for the amalgamation of certain Sheriffdoms has not, at the time when we write, reached Scotland, and the usual secrecy in which the present Government hides its plans has prevented its probable terms from being known. Enough, however, has oozed out in regard to the proposed changes to lead us to the conclusion that the Bill is not likely to justify the delay that has occurred in filling up the vacant Sheriffdoms. To combine Kincardineshire with Aberdeenshire may be right enough, considering the small extent and the position of the former county, more especially as that combination, along with the removal of the resident Sheriff-Substitute at Peterhead, will relieve us from the scandal of two miserably underpaid Sheriffs'-Substitutes. Even here, however, *le jeu ne vaut pas la chandelle*. If the whole judicial system of Scotland is to be re-arranged in two or three years, the saving to be effected by this amalgamation will be absolutely *nil*. The expense of preliminary inquiries, and of passing the Act, and the inevitable expense and discomfort of every change, will more than balance the paltry saving of £200 or £300 a-year for two or three years. The same objection applies still more strongly to the other changes understood to be contemplated. To combine Fife with Perthshire is said to have been first proposed, and to have been found impracticable at the present moment. To annex it to Linlithgow, Clackmannan, and Kinross, already a sufficiently composite Sheriffdom, also appears to be an undesirable step, and the junction of Forfar and Fife would probably involve too much work for one man, at least at the very moderate salary that may be expected from the present Government. Perhaps the most sensible arrangement that could be suggested would be to hand Fife over, without any addition of salary, to the Sheriff of Mid-Lothian, who has already £1,700 a-year, and very little to do. This, we think, would be extremely gratifying to Mr Lowe. Orkney and Shetland have also been without a Sheriff for some months, and it is yet unknown whether they are to be simply handed over to Sheriff Fordyce, or some more complicated arrangement is to be made.

That something small in the way of re-arrangement is to be done is quite understood: and all we have to say is that it would be better left undone. It would have been better for the dignity of the State as well as for the interests of the districts immediately concerned, that the vacant Sheriffships should have been filled up when they occurred. Important changes in the Judicatories of Scotland may be imminent, and it might perhaps have been allowable, though we should have held it neither gracious nor expedient, to appoint to the vacant offices, but to make the appointments subject to recall, if subsequent changes should require it. What has been done, however, is to keep two considerable counties without a Chief-Magistrate and Judge

for months, not because a general bill for reforming the arrangements of Sherifffdoms is to be immediately introduced; but merely because such a bill *may* be introduced some years hence, and because it is desired to effect a few combinations which may reduce the number of officials whose vested rights must be taken into account in that contingency. When the expected measure passes, it is certain that deaths or resignations will have cleared away one-half of the anticipated difficulties, and that the necessity of making new appointments for carrying on the business of the country will have removed the other half. In the meantime, the present Government is earning for itself a niggardly and pennywise reputation, and alienating from it thousands in the country who suffer by the long suspense and inconvenience that has been occasioned, but also the members of the legal profession. No profession is more ready, as a multitude of law reforms carried by its aid have proved, to sacrifice its own interest for the general good; but it cannot love a Government which nibbles and pares at its scanty preferments and emoluments, as if merely to mortify its members, without effecting any adequate saving or advantage to the State.

The controversy about the Double Sheriffship has been chiefly carried on in our pages, and we believe that important adhesions have lately been gained for the party to which we incline—that, namely, which is opposed to it; but we confess we have no love for the intermediate plan of reducing the number of principal Sheriffs and increasing their judicial work. That has none of the advantages and all the disadvantages of the present system; and it will certainly be found quite as expensive. When a general Bill is introduced, we shall be glad to consider its merits, and if it adequately reforms the procedure and constitution of the Sheriff Courts, we promise it our cordial support; but we deprecate all tinkering, a kind of operation which is always attended with more irritation than benefit.

Mr Mellish, Q.C., on Scotch and English systems of Procedure.—Some time ago there was a fashion of praising the English system of legal procedure at the expense of our own; but those who followed this fashion received rather a severe reproof in the published evidence taken before the Courts of Law Commission. They have now been quite finished by a speech of Mr Mellish, Q.C., in the Law Amendment Society, at a meeting held on 2d May for the purpose of considering the Lord Chancellor's High Court of Judicature Bill. He was strongly opposed to the method in which that Bill proposed to have the new code of procedure framed,

“And could not help thinking that the real question as to the framing of a code of procedure was one of economy: the Government does not choose to go to the expense of getting a code of procedure framed as it ought to be done. It could not be done without the appointment of a paid commission for the purpose, and a certain expenditure of time. Of late years he had seen a good deal of the procedure in Scotch cases in which there was a most perfect amalgamation of law and equity which rendered their procedure much superior to ours, which proceeds

on the supposition that all questions are to be determined by a jury, unless the parties consent to have it tried otherwise, however unfit it may be for trial in such a mode. In the Scotch procedure each party told his own story in short sentences, instead of, as in our system of pleading, merely stating the legal results of the facts. In this way it is seen how much of the facts the parties are agreed upon; whereas with us, though a pleader may be told all the circumstances of the case—and if he had to tell the story of his client in the Scotch way, would be compelled to admit, perhaps, three-fourths of the facts alleged to exist by the other side—he nevertheless begins by traversing every allegation made by the other side. In the Scotch system the question between the parties naturally turned itself into the form of a special case, which, with us, can only be done by consent. There were no doubt some points in the Scotch system which were worse than our own, and a wrong issue is sometimes found after the trial to have been raised between the parties, and the whole thing comes to nothing; and in such simple actions as those for goods sold and delivered, and for libel, their proceedings are more dilatory than ours. He thought it quite possible to frame a system of procedure which would embody the good points without the defects of the Scotch system. In framing a system of procedure, great care must be taken not to sacrifice the present generation for the benefit of posterity. It had been said by one of the preceding speakers that the system should be framed at once, and whatever required alterations might afterwards be altered; but in our excessive zeal to amalgamate law and equity, the common and ordinary actions and suits in both might be made more expensive and dilatory than they are at present. He had come to the conclusion that the whole gist of the matter lay in the framing of an entire system of procedure; and if, for that purpose, it were necessary to postpone the Bill of the Lord Chancellor, he was of opinion that it ought to be postponed; but he did not think it would be necessary to postpone the Bill for that purpose, because it was not intended to come into operation till 1871, and with a properly paid commission appointed to frame a code of procedure, and present it to Parliament before that time, he did not see why the Bill should not be passed this year. If Parliament approved the code of procedure thus framed, they might then appoint a body, whether composed of the Judges or others, to alter, from time to time, any defects which might be found in the code to require amendment. But he doubted whether it would be safe to pass the Bill in its present form, a Bill which contained some sections unlike anything he had ever seen in an Act of Parliament before. He hoped he should not be thought to be less zealous than others in carrying out the great reforms proposed, but he thought it exceedingly important that they should be carried out properly, and that a system of procedure should be framed before the Act was finally passed."

Arrestment of Wages.—The state of legal opinion in England on this subject will be gathered from the following paragraphs in the *Law Times* for May 21:—

"We recently drew attention to what we consider a useful function conferred upon the County Courts, namely, a power of attachment by which a garnishee summons may be issued to employers for the purpose of attaching the wages accruing to their workpeople. We are considerably surprised to see that Mr Norwood intends to bring in a Bill to take away this power. It is true that the power sought to be taken away was not conferred by statute, but by an Order in Council of the 18th Nov., 1867, which made the garnishee clauses of the Common Law Procedure Act 1854 applicable to County Courts. Section 61 of that Act empowers a Judge to order that debts "owing or accruing" from the garnishee to the judgment-debtor shall be attached to answer the judgment-debt. This remedied what we conceive was before a very great hardship, for it was held in *Jones v. Jenner*, 4 W. R. 651, that a judgment-creditor could not proceed by attachment under the garnishee clauses of the Act of 1854, upon a judgment

obtained in a County Court. This being the position of things, we cannot see why wages should be exempted from the process of garnishment.

"Not long since we received a communication from a tradesman, pointing out the difficulty of recovering a debt from a person in employment, because a personal service of a County Court summons is necessary. It cannot be served by leaving it at the place of business of the employer, and it is often very difficult to find where an unmarried man lives. Thus, in the first place, it necessitates considerable trouble before a judgment can be obtained upon which the garnishee process can become available. Judgment-summonses are of very little use in such cases, and until the order in council already referred to, making the garnishee clauses of the Common Law Procedure Act applicable to the County Courts, the creditors of workmen were absolutely without any effectual remedy. Under these circumstances we would suggest to Mr Norwood that, if he is determined to deprive creditors of the remedy of attachment of wages, he should amend the County Court Acts so as to allow of service of summons at the place of a workman's business, or render service upon the employer effectual. This, of course, would not compensate for the loss of the remedy by attachment, but it would give the creditor a wider grasp upon this class of debtor. If the credit system among the artisan class is to be recognised by the law it should be placed on the same footing as the same system in commerce generally, and we cannot help regarding Mr Norwood's proposal as a suggestion for exceptional legislation to which there is a fundamental objection."

Differences on the Bench.—The Irish Judges were occupied on Saturday, May 14, in the Court for the Consideration of Crown Cases Reserved in hearing arguments in the case of *Reg. v Meagher*. The prisoner had been sentenced to penal servitude for writing threatening letters; and the strongest point against him was that the three stamps on the letters he was said to have written had been torn off a sheet of postage stamps which had been found in his drawer. In the course of Serjeant Armstrong's argument for the Crown, when the learned counsel was arguing 'hat the evidence in relation to the postage stamps pressed strongly against the prisoner, the Lord Chief Justice (Whiteside) observed that he did not see how any person of ordinary mind could appreciate the force of the point made.

Morris, J. said he happened to be a person of ordinary mind, and he could see very plainly the cogency of the argument, which was, in fact, almost conclusive.

The Lord Chief Justice repeated that he could not see it.

Morris, J. said if people did not understand arguments, he could not help it. Arguments, however, would be better understood if there were less interruptions of counsel.

The Lord Chief Justice said he considered that a most unwarrantable observation.

Morris, J. said he did not mean to be put down by remarks of that kind. He had his duty to discharge, and he would do it.

The Lord Chief Justice said he, too, had his duty to discharge, and he was not to be lectured because he discussed the points of a case with counsel.

Erratum.—In Sheriff Barclay's article in last number of the *Journal*, p. 251, 11th line from foot, for "remedial" read "unremedial."

General Council of Procurators.—Diets for the examination of applicants for admission as procurators were held by the examiners of the General Council at the Faculty Hall, Glasgow, on the 12th, 13th, 14th, and 16th curt, when of the twenty-four applicants who were examined, the following were found duly qualified for admission:—John Sturrock, Jun., Ayrshire; George Miller, Sutherland, Caithness-shire; Archibald Campbell Black, Dumbartonshire; David Hunter,

Forfarshire; Charles Macfie and John Wallace, Lanarkshire; Hinton Hasluck Campbell, Andrew Stephenson Forrest, and James Law Philp, Stirlingshire; and William M'Michael, Wigtownshire.

Obituary.—WILLIAM TOWERS-CLARK, Esq., of Wester Moffat, Dean of the Faculty of Procurators of Glasgow, (of the firm of Towers-Clark, Robertson, and Ross), died while travelling from Glasgow to his country house near Airdrie, April 23, aged 65.

ALEXANDER JOHNSTONE PENN, Esq., Procurator, Glasgow, died at Glasgow, April 21.

PATRICK GRANT, Esq., W.S. (1825), Sheriff-Clerk of Inverness-shire, died at London, April 18, aged 65.

ALEXANDER GORDON, Esq., formerly Sheriff-Substitute of Sutherlandshire, died at Toronto, Canada, March 4. He was a son of the late Rev. William Gordon, minister of Elgin.

JAMES AITKEN, Esq., late Circuit Clerk of Justiciary, died at Edinburgh, March 26.

WILLIAM M'GUFFIE, Esq., Sheriff-Clerk Depute of Wigtownshire, died at Wigtown, March 24.

THOMAS ERSKINE, Esq. of Linlathen, Advocate (1810), died at Edinburgh, March 20, aged 81.

"Mr Erskine," says his biographer in the *Scotman*, "was born on the 13th October, 1788, of a race fertile in able men. His great grandfather—the first of his branch—was a younger son of the second Lord Cardross, a grandson of the Earl of Mar, so powerful in Scotland in the time of James the Sixth. Mr Erskine's grandfather was the famous jurist, John Erskine of Carnock and Cardross, author of the 'Institute of the Law of Scotland.' The eldest son of the author of the 'Institutes' was the Rev. Dr John Erskine, one of the clergymen of Greyfriars', and colleague of Principal Robertson. He was well known in his day as an able theologian; his life was written by Sir Henry Moncreiff. The father of Thomas Erskine, who was the youngest son of the jurist, died while he was a child, but his name is remembered even to this day among lawyers for his legal accuracy. His mother was one of the Grahams of Airth, and he was connected with the Stirlings of Kippenross, of Keir, and of Ardoch, and also with the Murrays of Abercairney. Much of his boyhood and youth was passed at these places and at Cardross, and to his recollections of Stirlingshire and Perthshire he always reverted with peculiar fondness. Many an anecdote, humorous or tender, he would tell of old Scottish life and manners, as he had known them seventy years since, in these ancient country houses.

"He was called to the bar in 1810, when Walter Scott, Jeffrey, and Cockburn flourished in vigour. He would describe the society of the bar, as it then was, rich in men of ability, and even genius, and in strong and varied character, but without much that was in sympathy with his own deeper and more devout convictions. We believe he never sought or obtained much law practice. But he was early relieved from this necessity, when, on the death of his elder brother in 1816, he succeeded to the family inheritance. Many, however, of his chief intimacies continued to be with members of the legal profession. To Lord Rutherford, Lord Fullerton, his cousin-german Lord Manor, and many more, however they may have differed in other respects, he was bound by ties of scholarly sympathy and old friendship, which ended only with their lives."

JAMES GORDON, Esq., W.S. (1829), died at Edinburgh, March 11.

ANDREW GRIEVE, Esq., W.S. (1821), died at Edinburgh, May 6.

WILLIAM BELL, Esq., Solicitor, Dundee, died May 3.

CHARLES STEWART, Esq., S.S.C. (1820), died at Edinburgh, May 7.

JOHN BISSET, Esq., S.S.C. (1823), died at Ormiston, May 11.

ARCHIBALD SCOTT, Esq., Solicitor-at-Law (1831), (Scott, Bruce, and Glover, W.S.) died at Edinburgh, February 5.

GEORGE CAIRNS, Esq., Solicitor-at-Law, (1821), Treasurer of the Society of Solicitors of Law, died at Edinburgh, May 11.

JAMES CONDIE, Esq., Solicitor, Perth, (Condie and Ballingal), died at Perth, May 12, aged 72. He was factor and legal adviser to a large number of the landed proprietors of that county, and, from his shrewd and practical sagacity, he possessed their entire confidence. He was clerk to the Perth Parochial Board for many years.

Notes of Cases.

COURT OF SESSION.

FIRST DIVISION.

SIMPSON v. MUNRO.—May 13.

Sheriff Court Act, s. 15.—Action of transference in the Sheriff Court of Banffshire at the instance of Simpson, against Mrs Monro, executrix of Mrs Rhynas, in which Mrs Rhynas had been pursuer and Mr Simpson defender. In the original action the last proceeding had been the lodging of revised condescendence for pursuer on Feb. 2, 1866. The pursuer died on April 2 thereafter. Some correspondence took place thereafter with regard to the present defr. sisting herself in room of Mrs Rhynas, which she did not do; and on 19th Oct., 1869, this action of transference was brought by the defender in the original process. The S. S. (Gordon) found that the original process stood dismissed under sec. 15 of the Sheriff Court Act, and therefore dismissed the action as incompetent, there being no depending action capable of being transferred. The S. S. was of opinion, as far as can be gathered from the note appended to his interlocutor, that pursuer was bound to bring his action of transference within six months from the death of the pursuer in the original action, the same period within which the executrix was entitled to sist herself if she intended to insist in the action. The pursuer appealed. The Court held (Lord Deas being doubtful) that the S. S. was wrong. The action would have been absolutely dismissed at 2d August in ordinary circumstances, but the peculiarity here was that from April 2, 1869, there was only one party to the action. The question was whether, in such a case, the section applied, or whether it was not covered by the proviso at the end of the section—"provided always that nothing herein contained shall apply to cases in which the right under the action has been acquired by a third party, by death or otherwise, within such period of six months." It seemed clear that the section was

not intended to apply to this case, and that the contention that the proviso applied only to the party so acquiring right was untenable. Appeal sustained, and judgment altered.

Act.—Mackay. Agent—A. Morison, S.S.C.—Alt.—Scott. Agent—D. Milne, S.S.C.

SECOND DIVISION.

RITCHIE v. M'LACHLAN AND OTHERS.—May 14.

Arrestment.—Question whether arrestments used in the hands of the agent for election expenses of Sir N. M. Lockhart by a creditor of one of Sir Norman's canvassing agents, were effectual to attach the amount due by Sir Norman to the latter. It was maintained that Sir Norman was the proper debtor of the common debtor—that the arrestments should therefore have been used in his hands, and that the arrestment in the hands of the election agent was truly an arrestment in the hands of a *debtor of the debtor of the common debtor*, which was incompetent. The L. O. (Jerviswoode) held that the arrestment should have been laid on in Sir N. Lockhart's hands. The Court altered, and found that the election-agent being in funds to pay the common debtor, and having had dealings with the common debtor with a view to payment, the arrestments were properly laid on in his (the election-agent's) hands.

DUFF v. FLEMING.—May 18.

Landlord and Tenant—Lease—Destruction of subject.—Appeal from the Sheriff Court of Dundee in an action against Matthew Fleming, concluding for £55, being half-year's rent due at Whits., 1869, of premises let by pursuer to defr. for a bottling store under a lease dated 1867 for seven years. The defence was founded on the fact that in Jan., 1869, a fire took place whereby the premises were rendered wholly unfit for defr.'s business, and defr. was compelled to seek other premises.

The landlord maintained that the injury did not amount to *rei interitus*, and that the landlord had offered to repair the premises, and had in fact done so, in the course of seven weeks from the tenant leaving them; further, that the lease obliged the tenant to keep the premises in repair, which threw the burden upon the tenant of repairing or restoring the premises to whatever extent the same had been injured.

The S. S. and Sheriff both held that, in the circumstances, there had been such a destruction of the subject let as to put an end to the lease, and entitle the tenant to seek other premises. The Court adhered, and held it to be settled that in the contract of lease a destruction of the subject let put an end to the contract. What constituted destruction of the subject was a question of circumstances and of degree, and must be judged of with reference, among other things, to the purpose for which the subject was let. Here the fire had so injured the premises as to render them useless for defr.'s business, and that was enough. With regard to the clause in the lease, their Lordships were all of opinion that clauses of this description did not extend to cases of destruction by fire or storm.

HIGH COURT OF JUSTICIARY.

H. M. ADV. v. ROBERTSON.—*March, 1870.*

LORDS JUSTICE CLERK AND NEAVES.

Judge—Slander—Murmuring—Indictment—1540 c. 104.—Alexander Robertson, Dundonnochie, was charged at common law with the crime of slandering a Magistrate or Judge in reference to his official conduct or capacity; and further with the crime of “murmuring” a Judge as set forth in an Act passed in the seventh Parliament of James V. of Scotland. By chapter 104 of that Act, which bears date 1540, “it is statute and ordained in times cumming that all Justice, Scheriffes, Lordes of Session, Baillies of Regalities, Provost and Baillies of burrowes, and uthir deputes and all uthir Judges, spiritual and temporal, alsweill within regalities as royaltie, sall do trew and equal justice to all our Sovereaine Lordis lieges, without any partial counsell, rewardes, or buddes taking, further then is permitted of the law, under the paine of tinsel of their honour, fame, and dignitie, gif they be tainted and convicted of the samin; and gif any maner of person murmuris ony Judge, temporal or spiritual, alsweill Lordes of Session as others, and proovis not the samin sufficientlie, hee sall be punished in semblable maner and sorte as the saide Judge or person quhom he murmuris, and sall pay ane paine arbitral, at the will of the King’s grace, or his council, for the infaming of sik persones.” The crime libelled was declared to have been committed, in so far as (1) the said Alexander Robertson did, on 30th December, 1869, in the house occupied by him at Dundonnochie, wickedly and feloniously write and subscribe a letter to Lord Hatherley, Lord Chancellor, complaining “of the conduct of Hugh Barclay, Esq., S. S. and a Magistrate of this county, who, for eighteen months, has been misapplying those powers intrusted to him for the safety of the public, and for the repression of crime, in order to maintain a fraud upon the lieges, or what is at least an exaction which cannot be enforced by the laws of the realm.

“Owing to my open and legitimate opposition to the imposition referred to—viz., the Dunkeld Bridge pontage—I have been subjected to a malicious persecution by Sheriff Barclay, and, in consequence of his partiality, my privileges of citizenship have been invaded, and my personal protection rendered insecure while in the peaceful exercise of my lawful rights. Sheriff Barclay has committed myself and others to prison, wantonly, maliciously, and without probable cause, thus, as it were, taking upon him to suspend our Habeas Corpus Act—in my own case alleging that I was exercising too great an influence over the minds of the people in the north country.

“On the 18th July, 1868, Sheriff Barclay, forgetting his status as a Magistrate, and, acting as a criminal detective officer, personally dogged me, and made inquiries regarding what time I would leave an hotel which I was calling at in Dunkeld. He watched me passing the pontage-gate, and, while I was standing beside it, he assaulted me, and, addressing foolish challenges to me, did all he could to get me involved into a squabble. He also caused several parties to intercept my progress on the highway, and interfered with the Procurator-Fiscal of the county in the due and ordinary discharge of his duties, in order to get me more severely punished for simply acting in my own defence. Sheriff Barclay, in the month of September last, again acted as a detective, and made undue efforts to get me

criminated in an act of malicious mischief, while he could have learned, by the simplest inquiry, that I was not in the locality at the time of its perpetration, and could not possibly have been guilty of the crime he was determined to fasten upon me, and so forth."

The letter further stated:—"I have strong reasons for believing that Sheriff Barclay has been unduly influenced in the course he has taken in the above instances by the acceptance of money to such an amount as to bias his judgment; and I am also persuaded that, had my friends made themselves agreeable to him by doing the same, the results would have been different. I have no means of knowing whether he looks for more gratifications; but there can be no doubt whatever that his partiality as a Judge and as a Magistrate (whether amounting to utter corruption of office or not) his collusion with those interested in protecting the fraud or extortion complained of, his disrespect to the supreme Legislature of the nation by tampering with Acts of Parliament, and the falsehoods of which he has been guilty, and other acts in the same cause, have brought a great scandal upon the administration of justice in the country of Perth, and tended to bring the laws of the land into contempt."

And that the accused addressed the said letter to the Right Hon. Lord Hatherley, Lord Chancellor of Great Britain; and this with intent to slander Hugh Barclay, Esq., Sheriff-Substitute of Perthshire, in reference to his official conduct and capacity. The panel was also charged with having on Dec., 31, 1869, with similar intent, addressed a similar letter to the Home Secretary:—

And 3d, it was charged that on Dec. 30 or 31, 1869, the panel made copies of the above letters; that on 3d Jan., 1870, at a public meeting of the inhabitants of Birnam, he stated that he had written such letters, and subsequently furnished copies thereof to the *Perthshire Advertiser* and *Dundee Courier*, in both of which journals they were published; and that in this way he wickedly and feloniously published the said letters with intent to slander, and thereby did slander, the said Sheriff Barclay in reference to his official conduct and capacity.

MAIR objected to the relevancy, (first) want of specification of the slander. Nothing was said as to what the particular slander was. The panel was entitled to know the precise slander complained of against him. Several things in both the letters unquestionably were not slanderous. He did not know, therefore, what particular charge he was to meet. Further, the letters were not addressed to the Sheriff himself or to any private party, but to the Lord Chancellor and the Home Secretary. They were written for the purpose of complaining of the official conduct of Sheriff Barclay, and inviting inquiry; and they were, therefore, privileged and could not be taken cognizance of in a criminal Court.

LORD NEAVES was of opinion that the indictment was relevant in all its parts. With regard to the charge at common law, it could not be doubted that the slandering of a magistrate in his official capacity was a crime. As to the statute, the only matter connected with relevancy depended on the question whether the Act cited was still in force. On that subject, he could entertain no doubt, because he saw that on various occasions it had been libelled upon and recognised by the Court as a subsisting statute. As to the meaning of the word "murmuring" it could mean nothing else but dispersing complaints, and murmurs against a Judge's equity and honesty, such as would destroy his usefulness if proved, and the dissemination of

which ought to be punished if false. Coming to the minor proposition of the libel, it was well established that where there were different charges, particularly where there was a statutory charge and a common law charge of an analogous and cognate kind, one minor might be sufficient to cover both majors, provided the facts set forth in the minor made it an exemplification of the offences charged in each of the two majors. It was said that the minor did not specify the slander complained of. Many a man had been called a rogue in a sneer styling him an honourable man. What was ironical required explanation; but when it was stated in clear language that a Judge had taken money for his judgment, he could not understand how that could be made plainer. As to the letters being privileged, he recognised in the strongest manner the right of the subject to go to the fountain of justice and seek for redress when wrong had been done. He was disposed to think that the old Act of 1540 included complaints made to the proper quarter. Even where the complaint was made in the most correct, specific, and intelligible manner, he was pretty sure the object of the statute was, that if the complaint could not be proved, the party making it did so at his own risk. In certain circumstances, he should be very slow to interfere in that course of proceeding. If a party made a complaint to the proper quarter against a Judge, whether the highest in the land or the humblest, setting forth maladministration and corruption, and made his complaint in such a way as admitted of its being taken up and investigated, he should be very slow to say that next day the Procurator-Fiscal should charge that party with slander. But it depended a great deal on the nature of the communication made, and on the animus displayed. Now, the communications made in this case appeared to him to be communications which it was utterly impossible for the authorities to investigate. There was no specification given of what the charges were. They were stated in such a way that no inquiry into them could be commenced. Not only so; instead of leaving the letters in the hands of the parties to whom they were addressed, the accused, as the concluding part of the indictment alleged, resorted instantly to an expression of public opinion, and in that way circulated throughout the country complaints against the efficiency of an acting Judge, without specification of any kind—a procedure calculated to destroy the Sheriff's usefulness without bringing the matter to any kind of issue.

LORD JUSTICE-CLERK concurred in the result. With regard to the second objection, that plea could not be maintained against the last part of the indictment, because, in so far as the prisoner was charged with having published the slanderous statements, it was clear that the defence of privilege could not be sustained. With regard to the first part of the indictment, he did not think the plea of privilege could be sustained to the effect of preventing the indictment from being tried. He was not prepared to say that, apart from the proof of facts, of motive, or intent, the allegation made was not relevant. He concurred that it was the right and privilege of every citizen of this country to make his complaint against whomsoever or on what ground soever that complaint might be made. As long as that right was exercised in good faith and honesty, he did not think its exercise could ever form the foundation of a criminal charge. On the other hand, if the form of complaint was only made a cover for private malice, he thought it was not to be assumed as an abstract proposition that that would be covered by the plea of privilege. Therefore, it would remain a very serious question for the jury how far the official character of the persons to

whom the letters were addressed should protect the prisoner in making the charges they contained; and while the whole question of the intent to slander was brought forward, he concurred in thinking that the Court could not in the present stage prevent the prosecutor from proving his allegations.

The prisoner pleaded guilty to the first two charges, which plea the prosecutor accepted.

LORD NEAVES—I certainly feel considerable satisfaction and relief at the termination of this case in the manner in which it has now come to a close. It is about thirty years since such a case was before the Court; and it is a very important thing that the law has been vindicated. The prosecutor, with a becoming desire to discharge his duty in a manner which should at once vindicate the law and not press too severely upon the prisoner, has seen cause to accept the modified plea; and I have no doubt that course was the right one, while, at the same time, it was, perhaps, a generous one. We are thus relieved from any consideration of the statute; and I confess I feel that to be a considerable relief. If the statute were the ground on which this conviction were to regulate us, I fear the punishment would be severe; because we should be under the necessity of professing, at least, to inflict upon the prisoner the same punishment as upon a corrupt and partial Judge. We are relieved from this under common law; and there the only charges which the panel has pleaded guilty to are the charges of sending a letter to the Lord Chancellor and another to the Home Secretary. These letters are very improper letters. They contain some matter which he might be entitled to submit to those parties; but they also contain what he has himself admitted to be slanderous. We are bound, to a certain extent, to regard the circumstances under which they were written. If the Crown had insisted on making it a case of dissemination, and of careful persistence, we should have been obliged to look that matter in the face; but I am glad to think that we have the strongest reason to believe that those misstatements and misrepresentations were not the result of any malignant or personal feeling, in the view of persecuting an individual. Such a thing as that would be very base, and would deserve high reprobation. What we have to do, however, is to check the rash, hasty, and ill-considered statements made against those who are administering justice—a most difficult task, in which it is very hard to please everybody, almost impossible, I may say, in general, to please anybody. It cannot be that those who think themselves ill-used are to express their strong and enthusiastic views in this manner, whether publicly or privately. Still, I am inclined to make some allowance, and to believe that the law has been vindicated in the present case by the conviction which has taken place upon the admission of the panel; and, leaning towards the side of leniency rather than otherwise, I propose substantially the sentence which was pronounced in the case of Porteous—that the prisoner be sent to jail for one month, and shall pay to the Queen a fine of £50, or be incarcerated for another month.

LORD JUSTICE-CLERK—The sentence which has been proposed by Lord Neaves is not the sentence which would necessarily have followed a conviction upon the other parts of the indictment. If the panel had been convicted not merely of writing these statements—statements which he admits to be slanderous—but of having published them to the world, unquestionably it would have been the duty of the Court to have inflicted a punishment of a very different character. We are relieved from that necessity by

the Solicitor-General having accepted the plea which has been tendered; and we have only to deal with the case of an application made in a public matter to officials of the Crown, but containing in it the substance of a slanderous imputation on a Judge. I am anxious, in announcing the sentence to the prisoner, that the ground on which the Court is in a position to limit the sentence to what Lord Neaves has proposed, and which I have stated, should be clearly understood. It is quite true that it is the right of every subject of this country to resort to the proper authorities in order to obtain redress of grievances, and the language in which such complaints are couched will not be very scrupulously or accurately scanned, if the motive be a true and legitimate one. But the prisoner has admitted by his plea that the statements which were made against the Sheriff were not true, but slanderous. In the circumstances, the sentence which has been proposed by Lord Neaves, and which the Court now pronounce, is one which I trust will answer all the purposes of justice in the case. I hope it will be a warning to the panel, in the conduct of public discussion, to respect that which every one is bound to respect—I mean what he owes to his neighbour, and still more what he owes to the established judicatories of the country. The sentence of the Court is, that the prisoner be sent to jail for a month, and that he pay a fine of £50 to the Crown, or suffer imprisonment for another month.

HOUSE OF LORDS.

FERGUSON AND HUSBAND v. HAY NEWTON; STUART HAY v. HAY NEWTON.—*May 9.*

(In the Court of Session, July 18, 1867, 5 Macph. 1056).

Death-bed—Faculty—Entail—Provision to Wives & Children.—Three appeals from the judgment of the First Division of the Court of Session in reductions brought to ascertain the construction of the entails of the estate of Newton and bonds of provision granted by the late John Stewart Hay Newton of Newton, father of respt., who is heir of entail in possession. Mr Stewart Hay Newton died in 1863, and on his death-bed executed a deed of locality binding his heirs to infest his wife, in liferent in certain locality lands specified in the deed; and a bond of provision in favour of his younger children for £4000. In 1860 he had also executed a bond of provision and annuity in favour of his wife for £500 a-year, purporting to do so under the powers of the Aberdeen Act. Respt., the heir of entail, raised three actions of reduction, (1) of the deed of locality; (2) of the deed of provision in favour of the wife under the Aberdeen Act; (3) of a bond of provision in favour of the two younger children. As to the first action, the original entail of the estate of Newton contained a clause, "reserving and excepting always furth and from the said clauses irritant full power and liberty to heirs and members of tailzie, to grant liferent infeftments to my lady and their ladies and husbands by way of locality allenary in lieu of their terce and courtesie, which they are hereby excluded not exceeding a third part of said lands, so far as the same is free and unaffected for the time with former liferents and real debts, and after deduction of the annual rents and personal debts that do, or may, affect the same;" and there was

a like exception of provisions for the younger children. Pursuer contended that this deed was executed on death-bed, and was invalid, whereas defra. contended that such bond, being made under the faculty above contained, it was excepted out of the law of death-bed. As to the second action, the validity of the bond of provision to the wife under the Aberdeen Act, pursuer contended that the bond was not delivered till within six days of the granter's death, and while he was on his death-bed, and that the bond was revoked by a deed of entail executed by the granter in 1861, which conveyed the estate to pursuer free from any such burden; and, moreover, under the Rutherford Act the power to grant such bonds was taken away from heirs possessing under deeds of entail executed subject to the latter Act. On the other hand, the widow contended that appt. was barred from maintaining his action by having approbated and taken advantage of the deeds of entail executed by his father; and further, that the bond being delivered at or about its date was now valid. In the third action, for setting aside the bond of provision in favour of the younger children, pursuer contended that, as it was made on death-bed he was entitled to have it reduced; while defra. contended that the bond could not be set aside by the heir who had approbated the deed of entail giving such powers; and, moreover, that the bond was exercised by virtue of a faculty, and therefore was not affected by the law of death-bed. The L. O. (Barcable,) and the First Division, decided in favour of pursuer in all the three actions, holding that the deed of locality was not protected from the operation of the law of death-bed, because the heir of entail executed it *qua* owner of the estate; that the bond of provision in favour of the wife was evacuated by the execution of the entail of 1861; and lastly, that the provision to younger children was also reducible by respt. for a similar reason to that which affected the deed of locality. The two separate classes of defenders appealed against the decisions, and the appeals were argued in March last, when judgment was reserved.

The LORD CHANCELLOR (Hatherley) said that, as regarded the bond of provision executed by the late Mr Newton under the Aberdeen Act, it was agreed that that was a valid bond when granted, and the main question was whether it had been revoked. He thought that it had been validly revoked. That the intention was to revoke the bond was clear, from this, that in resettling the estate under the Rutherford Act, the granter made an affidavit stating that there was no such bond in operation or in existence. He, no doubt, made that declaration advisedly. Having power to revoke it, there is no doubt that he did revoke it. Then, it was argued that the new bonds of provision and locality were good, because they were executed under a faculty, and so were exempted from the law of death-bed. The Court of Session, however, had satisfactorily stated reasons why that view was untenable. What Mr Newton did was not by virtue of a faculty, but by virtue of his being the fiar, there being no restriction operating on him to prevent his making such bonds if so inclined. That, therefore, disposed of the bond of provision in favour of the children. There was also an argument that inasmuch as Mr Newton had disentailed the estate, and then re-entailed it, he was competent during the interval to make the deed of locality as a provision in lieu of the widow's terce; but the granter during the interval was bound to re-entail the estate in a certain way, and had no power to relieve himself from the fetters during the process of resettling it. It followed, therefore, that on all the

points the Court of Session was right, and the bonds-in favour of the widow as well as of the younger children were invalid.

LORD CHELMSFORD agreed.

LORD WESTBURY agreed, and had thought that the very comprehensive judgment of Lord Curriehill would have been accepted as satisfactorily disposing of the whole case. He regretted that it was in the power of the heir-at-law to set up such a defence as the law of death-bed to these deeds; but such was the present law, and there could not be a doubt that he was entitled to reduce the deeds on the ground of their being executed on death-bed.

LORD COLONSAY concurred.

Affirmed with costs.

DUNCAN v. SCOTTISH N.E. RY. Co.—May 9.

(In the Court of Session, Dec. 13, 1867, 6 Macph, 152).

Railway—Poor-rate—Exemption.—The question was whether respts. were liable to pay poor-rates in the parish of St Vigeans, or were exempted by their Act of Parliament. In 1836 an Act of Parliament was passed to authorise the construction of the Dundee and Arbroath Railway. It was provided that the lands and heritages conveyed to the company should not be liable for any feu-duties or casualties to the superiors, nor for land-tax, cess, stipend, schoolmaster's salary, nor any public or parish burden whatever; but the same should be paid by the original proprietor. A similar section was contained in another Act, authorising a railway to be made from Arbroath to Forfar. When the Poor-law Act, 8 and 9 Vict., c. 83, passed in 1845, it provided for the mode of assessing all railways, and the Lands Valuation Act, 17 and 18 Vict., 91, also applied to all railways. In 1866 the collector of poor-rates, claiming a poor-rate of £280, obtained warrants to poind, and poinded, two locomotive engines belonging to respts., who had by various Acts of Parliament acquired a right to the two railways authorised to be made in 1836. Thereupon the company suspended, and after condescendence and answers, the L. O., and afterwards the Second Division, held that respts. were not liable for poor-rates, whether as owners or occupiers, in respect of any portion of their railway constructed wholly on ground acquired by them in the manner specified by the statutes authorising the exemptions. The collector of poor-rates obtained leave to appeal. The appeal was argued before the House of Lords in Feb., when judgment was reserved.

The LORD CHANCELLOR—Appt. complained of certain interlocutors, whereby the Court of Session held that the railway company were exempt from poor-rates in the parish of St Vigeans. There were two acts of Parliament authorising railways to be constructed by the companies now represented by respts., and which contained sections purporting to exempt the company from parish burdens; and though these two sections differed considerably in form, they might be taken, in this question, to be substantially the same. At the time the local Acts were passed, there was some jealousy apprehended as to the position of railways, and hence the stipulation in question, which was designed to reserve to the original proprietor his control over the land, part of which had been sold, so far as to leave him to pay the public burdens. At the same time, there seemed to be no intention in the Legislature to exempt the land altogether from rates. It was rather an

argument as to which of the two parties should pay them. That view of the construction of the Acts was confirmed by the fact that when the whole of the land of an individual was taken, then the company was to pay the burdens. Accordingly the argument that there was an entire exemption of this land from all rates was untenable. At the time these Railway Acts passed, the land was rated according to its value; but when the Scotch Poor-law Act passed, in 1845, an entirely new mode of rating was adopted by the Act. A railway was made assessable as a distinct tenement, and it was enacted that the rateable value in each parish should be ascertained according to mileage—that is to say, not according to the actual value of the land appropriated in the parish, or any improved value it might acquire, but according to the lineal measure of the railway passing through the parish. That rule was well illustrated, *Edin. & Glasgow Ry. Co. v. Adamson* 15 D. 337 17 D. 1007 *aff. 2 Macq.* 331. That being so, the first question was, what was the construction of the original Railway Acts exempting the land sold to the company for the purposes of the railway from all public and parochial burdens? In the first place, was the poor-rate, as it then existed, a parochial burden within the meaning of the exemption? He thought it was; but it was quite a different thing to say that that exemption was to extend to every possible alteration that might be made in the imposition of new and different burdens on account of the poor. The Poor-law Act of 1845 created an entirely new burden, which rested on principles altogether different, and it was not the same, nor was it any modification of the original burden, as it stood before 1845. The consequence was that the exemption created by the Railway Acts could not be deemed to extend to this new burden. It was a different liability altogether, never contemplated by the original Acts. The Session, therefore, in holding that the old exemption extended to the new Poor-law Act, and was to be deemed to be incorporated in it, was not correct, and the judgment must be reversed.

LORD CHELMSFORD arrived at the same conclusion. The two sections in the Railway Acts were not identical nor quite consistent. At the same time he thought that the expression "parochial burden" may well be taken to include a poor-rate. The question was whether the Poor-law Act of 1845 impliedly repealed this exemption, because it created a new mode of rating. It no longer rated the lands occupied by the railway, but it rated the railway as a separate subject, and the assessment was not based upon the value of the land at all. When the Poor-law Act of 1845, therefore, came into operation, the enactments in the local Railway Acts ceased to apply, because there was nothing left upon which they could operate.

LORD WESTBURY—It had been argued that the local Acts operated as a Parliamentary exemption from all parochial burdens, and that that exemption had not been taken away by the Scotch Poor-law Act. No doubt if the local Acts had still governed the question the lands would now be exempt; but the enactments of the Poor-law Act so entirely altered the relative position of the parties, and the mode of rating, that they superseded and repealed those prior enactments. The mode of assessment was now to rate the railway as a distinct subject, and to calculate its value in any parish according to mileage, as subject to the modifications introduced by the Valuation of Lands Act. The exemption in the Railway Acts applied only to the poor's assessment as it existed before 1845, but it was no longer applicable to the new state of things. No doubt some injustice may have been done to the railway company; but they ought to have brought the

subject of their previous exemption before the Legislature when the Poor-law and Valuation Acts were passed, and have had some saving clause introduced.

LORD COLONSAY said he quite agreed that the phrase "parochial burden" included a poor's assessment; but he had great difficulty in concurring in the conclusion arrived at by his noble and learned friends as to the effect of the Poor-law Act repealing the prior exemption. The state of the Acts was very unsatisfactory, yet he did not quite see how the principle could be carried out otherwise than by the simple rule now proposed; for the railway company had now so mixed up with the lands originally acquired other lands which had since been acquired, that the subject was otherwise inextricable. For this latter reason mainly he concurred in the judgment of the House.

Reversed.

MILLER v. LEARMONTH.—May 17.

(Not reported in Court of Session).

Husband and Wife—Marriage Contract.—Respts. were trustees of Mr and Mrs Finlay's marriage settlement, which was executed after their marriage, and purported to settle the legitim and other rights of property to which Mrs Finlay was entitled in consequence of the death of her father, Mr Alexander, the proprietor of the Theatre-Royal, Glasgow, who died in 1851. Finlay afterwards became bankrupt. The marriage trustees then raised an action claiming the right to the fund included in the marriage settlement, and seeking to have it declared that the husband's creditors had no right to any part of the funds. The Court of Session decided in favour of the wife's trustees.

The LORD CHANCELLOR (Hatherley)—The action was brought by the marriage trustees of Mr and Mrs Finlay, to recover the fund which had been settled by a post-nuptial contract, and the trustee on the sequestrated estate of Mr Finlay resisted this claim, on the ground that the wife's legitim, which was part of the settlement, belonged to the husband's creditors, and not to the wife's trustees. The settlement was executed in 1851. It contained a covenant on the part of the husband to pay to the trustees a sum of £2000 on a future day named, and meanwhile to secure that payment by insuring his life for the amount. The wife also assigned all the estate heritable and moveable, to which she was entitled, or to which she might afterwards become entitled, in consequence of the death of her father. The fund was declared to be alimentary, which had the effect of protecting it from being attached for the debts of the parties. The main question in the Court of Session was whether this settlement would stand as a valid assignment of the wife's legitim to her marriage trustees. The summons in the action sought to have it declared that the whole funds, including the legitim, had been vested in the marriage trustees, and that the husband's creditors had no right to any part of the fund, and that the marriage trustees should recover payment of such fund from the estate of the late Mr Alexander. It seemed that the executor of Mr Alexander, at an early stage of the litigation, conceded liability to pay over the fund to some one, and if it had not been for the intervention of the bankrupt's trustee, this fund would probably have been divided among the parties

before this. But Miller contended that the legitim of Mrs Finlay became the property of her husband when Mr Alexander died. He first contended that this legitim was not included in the post-nuptial contract at all, but when one looks at the words of the deed, it seems clear that such a contention was unfounded. The bankrupt's trustee next set up several objections to the post-nuptial contract. He said—First, that the deed was never accepted by the trustees; second, that it was never intimated to the persons holding the fund; thirdly, that it was a voluntary deed, and so was not good against the husband's creditors; fourthly, that at the time of the deed the husband was insolvent, and so that the deed was void; and lastly, even if all these objections were bad, still, that the deed contained a provision unreasonably large, and that the Court ought to cut it down to something smaller and more reasonable. As regards the first two points, the evidence clearly showed that the chief trustee of Mr Alexander—namely, Mrs Alexander—had received intimation of the post-nuptial contract. It may well be taken in the law of Scotland as clear, that when the creditor in the fund is one of the marriage trustees, and accepts and acts under it, this amounts to a sufficient intimation of the assignation contained in such marriage contract. Then, as to the alleged insolvency of Mr Finlay at the time this post-nuptial deed was executed, the evidence was equally satisfactory that he was then solvent. The bankrupt trustee had in this appeal thought fit to print, as part of the proceedings, a sort of auctioneer's inventory of all the goods and chattels of Mr Finlay at that date. This was a most absurd course to take, and was a gross and shameful abuse of the practice of printing proceedings in this House. The document could have been of no possible use or advantage in this cause, yet it occupied 140 printed pages. This most unnecessary and improper expenditure of the client's money was most oppressive to those who will have to pay for it; and if any mode could be pointed out of disallowing the costs of that part of the printed case, the House would be most ready to assist the parties in throwing its expense on the person who is to blame. There was in the whole case no evidence of the insolvency of Mr Finlay in 1851, and that objection to the deed also failed. Then the House also was satisfied that there was nothing excessive in the provision which he then made, having regard to the circumstances of the family. The interlocutors of the Court below would therefore be affirmed as to all the objections raised by the appellant. It was matter of regret that this most unfortunate litigation could not be ended on the present occasion by the House deciding the point which was reserved by the Court below—namely, whether the husband's life-interest of the fund was attachable by the appellant for the creditors. The fund had been settled on the husband for life, and after his death on the wife for life, and after her death on the children.

LORDS COLONSAY and CAIRNS concurred.

Judgment affirmed, with costs.

TENNENT v. TENNENT'S TRS.

(In the Court of Session, May 27, 1868, 5 Macph. 840).

Reduction—Fraud—Undue influence.—Reduction of an agreement, by which appt. bound himself to surrender a partnership in the brewery at Wellpark, near Glasgow. (See Report in Court of Session.)

The LORD CHANCELLOR (Hatherley) entered at great length into the facts. Appt. was son of Mr Hugh Tennent, who had a large brewery at Glasgow; and he made an arrangement with his two sons, Charles and Gilbert; whereby they were to carry on the business, and to pay him four-sixths of the profits. Soon after the arrangement was entered into, Gilbert, the appellant, became involved in debt, and the panic which then existed in Glasgow prevented him from raising money to pay these debts. The consequence of his not paying these debts must have led to his ceasing to be a partner, because there was a stipulation to that effect in the deed under which the two brothers became sole partners. Gilbert found his debts amounted to about £8000. He disclosed his difficulties to his brother Charles, who referred him to the father. The father ultimately agreed to pay off Gilbert's debts, but on certain conditions, one of which was that Gilbert was to cease to be a partner, and to receive the sum of £35,000, minus the amount of the debts paid by the father, power being reserved to the father to restore him to the partnership if he thought fit. It appeared that Mr Lyon, the solicitor of the father, had the drawing up of the agreement. At that time appt. was forty years of age, and had been ten years in business as a solicitor in Glasgow, and had been induced to leave that business to enter the brewery. Appt. alleged that he had only a quarter of an hour given to him to read over the deed, and that he protested against its harshness; but knowing his father's temper he found it useless to object, and so executed it. After considering all the circumstances alleged and proved on both sides, the Lord Chancellor was of opinion that there was no trace of any undue pressure on the part of the father or the brother. There was nothing at all unreasonable in the arrangement made. On the contrary, having regard to all the circumstances, the arrangement was fair and reasonable. As to the allegation that appt. had no legal adviser at the time, that was scarcely necessary; and, indeed, it was difficult to see what a legal adviser could have suggested.

LORD CHELMSFORD concurred.

LORD WESTBURY had endeavoured several times to see whether he could not adopt appt.'s contention; but he was reluctantly compelled to agree with his noble and learned friends. He was unwilling to comment at length on the acts and conduct of the father and brother of appt., for both of them had gone to their account; but he was bound to say that there was nothing in their acts in this matter which any earthly tribunal could deal with. There was nothing amounting to undue influence on the part of the brother.

LORD COLONSAY concurred.

Affirmed with costs.

CAMPBELL AND OTHERS v. LEITH POLICE COMMISSIONERS.—*April.*

(In the Court of Session, Dec. 21, 1866, 5 Macph. 247).

Police Act—Street—Public or Private.—The Lord Chancellor said the judgment of the Second Division ought to be reversed, and it should be declared that the notice which ought to be given in the case was a notice under the 397th section, and that the L. O.'s interlocutor ought to be affirmed, in so far as it granted an interdict against respts. proceeding with their works. As to the costs, their Lordships should declare that in reversing

the judgment of the Court of Session no costs should be given to appts., for they were partly to blame, owing to the pleadings having been framed as they were. Their Lordships also regretted that a litigation of this kind should have been carried on for a period of six and a-half years, where the point involved was of so very small a character, and all difficulty might have been obviated by respts. giving a new notice, which would not have prejudiced the antecedent proceedings.

LORDS CHELMSFORD, WESTBURY, and COLONSAY concurred.

Judgment reversed with a declaration.

HAMILTON v. HAMILTON.—*April.*

(In the Court of Session, Nov. 20, 1868, 7 Macph. 139).

Entail—Rutherford Act.—Declarator that a deed of entail, dated 1693, governing certain lands and estates, held by the Duke of Hamilton as heir of entail in possession, was ineffectual and void, and the Duke had full power to sell and dispose of the lands at discretion. The L. O. (Barcaple) and the First Division unanimously held that the deed was not binding.

LORD CHELMSFORD—The question was whether respt. was entitled to a decree of declarator that the deed of entail under which he held certain lands was void? The deed, in its prohibitory clauses, expressly included a prohibition against altering the order of succession; but in the irritant and resolute clauses, while the other prohibitions were duly fenced, there was no mention of the prohibition as to altering the order of succession. It was not denied by appts. that there was no express irritant and resolute clause to fence the prohibition against altering the order of succession; but it was contended that the clause was impliedly included. That contention, however, could not be supported—the prohibitory clauses and the irritant clause fencing such a prohibition must both be specific: and while the irritant and resolute clauses were framed on the principle of specific enumeration, it was clear that the clause against altering the order of succession was not duly fenced. It was argued, however, that before the Rutherford Act, the prohibition against altering the order of succession was good at common law, and did not require the protection of the Entail Act of 1865; that argument was, however, presented to the Court below, and it was rejected. The Rutherford Act enacted that when an entail was defective in one of its clauses, it was to be taken to be ineffectual in all its clauses, and was to be no longer binding on the heir in possession. Now, that the clause against altering the order of succession was defective was clear, and therefore the deed was bad *in toto*. It was argued that the Rutherford Act did not apply where a defective clause was good at common law; but that doctrine did not apply to onerous deeds altering the order of succession, but only to gratuitous deeds. The present was an onerous deed, and so was not protected. Several cases had already decided that the Act applied to questions *inter hæredes*, as well as questions with third parties and creditors.

LORDS WESTBURY and COLONSAY concurred.

Affirmed with costs.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE, GLASGOW.—SHERIFF DICKSON.

SMITH v. JOHNSTONE & Co.

Prescription—Oath of Partner.—This was an action for wages against a dissolved firm and R. M'Hutcheson, one of the two partners of it, the other having gone to America. The portion of the claim prior to 19th October, 1866, was held to be prescribed, and a proof of it by the defenders' writ or oath was allowed. The pursuer proved the constitution of it to the extent of £20 by the books of the firm, and referred the constitution of the remainder, and the resting owing of the whole of the prescribed portion to the oaths of the defenders; and the defender, M'Hutcheson, having been examined on oath, Mr Sheriff Dickson pronounced an interlocutor, which, so far as relating to the question of prescription and the interpretation and effect of the oath is as follows:—*Glasgow, April 29, 1870.*—Having heard parties' procurators, and made avizandum with the defender R. M'Hutcheson's oath on reference, Finds that the said defender has not been interrogated as to the constitution of the claim to wages prior to 19th October, 1866, so far as the same was found not to be proved by the defenders' books: Therefore, finds the constitution thereof not proved: *Quoad* the sum of £20 referred to in the interlocutor of 11th March last, Finds that the said defender's oath is not affirmative of the reference, and that the resting owing of the said sum is not proved thereby.

Note.—The pursuer restricted his examination to the question of resting owing of the £20, upon which the defender, while admitting that he did not pay the debt himself, deponed that he did not know that it was resting owing; and that if it was, it was from some private arrangement between his late partner and the pursuer, but that he did not know of any such arrangement.

There is no precedent conclusively settling the legal effect of such an oath. A point somewhat similar arose in *Christie v. Henderson*, 1833; 11 S. D.; the rubric of which is,—“The drawer of a bill, accepted by four individuals, raised action on it above twelve years after it fell due, against two of the acceptors, the third being dead, and the fourth being bankrupt; on reference to oath, the defenders stated that they subscribed the bill, and delivered it to the deceased acceptor for his accommodation; that they thought it was then blank; that they got no value, and did not know if the deceased acceptor received any value; that they had never paid the debt, and do not know if any of the other acceptors had paid it: Held, by a majority of the Court, that resting owing was proved.” It is clear, however, from the observations from the Bench in *Drummond v. Crichton*, 1848, 10 D. 340, and *Boyd v. Fraser*, 1853, 15 D. 342, that that case did not settle any general principle, but proceeded on the special circumstances of the case, and particularly on the uncandid nature of the deposition.

The principle applicable to such cases is laid down by Lord Mackenzie in *Drummond v. Drummond* above cited, where, speaking of the analogous case of constitution of the debt in a bill, the learned Judge observes:—

"Can we say, then, that a party who swears that he signed a bill, and gave it to another person to be discounted, but does not know that in fact it was so discounted, has sworn that it was discounted, and that so the debt in it is established by oath of party? I am quite unable to say so."

"I put the case that the statute had said that the matter might be proved by parole, and a witness being called, was asked if he delivered the bill to be discounted, and said that he did. But when asked whether he saw it discounted, his answer was, 'No, no; I know nothing about that!' Would that be evidence that it was discounted? Could you ask a verdict from a jury on that evidence? It would be a plain case of defective proof, and I cannot see how the case is stronger, though the proof is that of oath of party to the same effect."

It may equally well be said in the present case: If the fact of resting owing were provable by witnesses, would it be sufficient to prove merely that one of the two partners of a dissolved firm did not pay? It was on the principle that such an oath is inadequate that in *M'Nab v. Lockhart and Hendrie*, 5 D. 1014, it was "held, in an action against the two partners of a dissolved company that a reference of the whole cause to the oath of one of the partners was incompetent, and that it ought to have been made to the oaths of both; and farther, that the failure of that partner to appear and depone was not conclusive against the other partner to whom no reference had been made." See also *M'Lelland v. M'Lelland*, 1851; 13 D. 504.

It will also be observed that there is nothing in the deposition in question to show that the defender had the leading charge of the business; while on the contrary, the parole evidence, if it could be looked to on this point (which is doubtful) would indicate that he had not, and that the pursuer dealt mainly with Robert Johnstone, the other partner of the firm.

Keeping in view the decided terms of the Act 1579, c. 83, that "the creditor shall have no action except he prove by writ or oath of party," the oath in question is thought to do no more than indicate a probability that the debt is still unpaid. Such a probability might perhaps suffice in a question of balancing conflicting testimony, but the Sheriff-Substitute is satisfied that it does not come up to the requirements of the statute. He takes leave to refer to his work on Evidence, sec. 1572, not as an authority, but as containing more fully the grounds of this opinion, along with an analysis of the decisions.

This judgment has been acquiesced in.

Act.—John Dunbar.—*Alk.* Arthur Alison.

SHERIFF COURT, INVERARAY.—Sheriffs HOME and CLEGHORN.

FERGUSON v. THE KIRK-SESSION OF INVERARAY.—*Jan.* 15, 1870.

We subjoin subsequent interlocutors by the Sheriff-Substitute and Sheriff in this case, which will explain the action. The previous judgments are given in the Journal for March last. *Inveraray*, December 24, 1869.—The Sheriff finds, in point of fact, that the pursuer was appointed rector and sole master of the grammar school of Inveraray, on 3d December, 1867;

Finds that he discharged the duties of the said office from 11th March to 11th September, 1868: Finds that he is entitled to the emoluments of the office for that period: Finds that the defenders have in their hands a mortification of a sum of £83 6s 8d for the benefit of the grammar school of Inveraray: Finds that they have failed to instruct any payment of the interest of the said sum towards the purposes of the grammar school since Whitsunday, 1836: Finds, further, that they have in their hands another mortification of £100 by the late James Campbell of Stonefield, for the benefit of the grammar school, of which they have had £4 17s 6d sterling in their hands since November 20, 1835, and the remainder with interest, amounting to £221 13s 4d, was paid to them by the Town Council on 11th March, 1868: Finds that they have not instructed any payment of the interest of the said sum of £4 17s 6d since Whitsunday, 1836: Finds that they are bound to accumulate the interest of the said sums so far as not paid: Finds that the pursuer is entitled to sue for the interest of the said principal and the said accumulated sums as part of the emoluments of office: Finds that the first-mentioned mortification, with interest to Martinmas, 1867, amounts to £127 12s 11d: Finds that the said second or Stonefield mortification, with interest also to Martinmas, 1867, amounts to £231 15s 3d, and that the said two sums amount to £442 14s 10d: Finds that the interest on this sum, at five per cent., for the half year corresponding to which it is sued for, amounts to £11 1s 6d, for which sum grants decree: Finds the pursuer entitled to his expenses, appoints an account to be given in, and remits to the auditor to tax and report, and decerns.

Note.—The points upon which the discussion in this case now turns are two:—(1) Whether the pursuer was, to use the words of the note to the Sheriff's last interlocutor, "the *bona fide* teacher of a proper grammar school;" and (2) if he is, to what extent may the defenders be called on to pay the sums sued for.

(1) The burden of proof in the first of these questions seems to the Sheriff-Substitute to lie on the defenders. No doubt in the general way, no one can be called on to prove a negative; but there are exceptions to the rule. Where a recognised legal right, like that of the Town Council, to appoint the master of the burgh school is exercised *ex facie* in a proper manner, the presumption appears to the Sheriff-Substitute to be, that it is properly exercised, and the burden of proving that there is anything wrong will lie with the person who objected. To hold otherwise, would be, as appears to the Sheriff-Substitute, to put the person exercising the right practically, if not formally, in the disadvantageous position of proving a negative, at least of proving what is so indefinite, as to amount to the same thing, and to be liable to the same objections. It is only upon a distinct statement of definite objections that the party exercising the right can meet the objector; there must be the objector's averments, and it must be his business to prove them. The first objection which the defenders take is, that the pursuer had no proper place to teach in. The place he used was the Free Church School. The objections to this appear to be that it was a departure from the terms of the lease to employ the building for anything but a Free Church school, and it might therefore be evicted from the Free Church and from the pursuer by the Duke of Argyll at any time. But even granting that this is correct, it seems to the Sheriff-Substitute

entirely *vis tertii* to the defenders. They are asked to pay, not in advance, but for work done, and it is no defence to say that the building which has been used for a grammar school may not be applicable to that or any similar purpose in future. If it has been used as a grammar school for the time for which the pursuer's salary is sued for, the whole objection falls. No attempt has been made to prove the building unfit, and the Sheriff-Substitute must therefore hold it to be admitted that it is sufficiently good, and that the pursuer taught in a proper place.

Then it is farther objected that the pursuer's appointment as Free Church schoolmaster was terminable on three months' notice, and though his appointment as burgh schoolmaster was in the same terms, it is an illegal stipulation, and could not be enforced. He might therefore be dismissed as Free Church teacher, and left as burgh schoolmaster, but without a school-house. But the same answer appears to the Sheriff-Substitute to apply. He is suing for work done, and it is time enough for the defenders to object when he applies for payment without having had a proper or convenient place in which to perform his duties; how far such a place may be necessary the Sheriff-Substitute does not feel called on to decide.

A farther objection is taken to the teaching in the pursuer's school, as not being of that kind which is necessary to constitute a *bona fide* grammar school. The defenders do not, as the Sheriff-Substitute understands, dispute the pursuer's capacity to teach a grammar school. But they aver that in point of fact he does not teach the branches necessary to be taught in one, and that his whole time is otherwise taken up. It is, however, admitted by the defenders that the pursuer taught English, writing, arithmetic, English grammar, geography, algebra, mathematica, French, and Latin. The only question is, whether he taught Greek or not. But there does not seem to be any doubt as to his capacity to teach it, or any refusal or even neglect on his part to do so if required. On the contrary, as one of his pupils went straight from his school to the University of Glasgow, it would appear most likely that he did teach it. But whether this be so or not, the Sheriff-Substitute is of opinion that the pursuer's time was not occupied in such a way as to interfere with the discharge of his duties in this respect. He does not consider that in the nature of his other duties there would probably be any greater obstacle in the way of the pursuer's teaching Greek than Latin, and there is no allegation of objection on the part of the Deacons' Court of the Free Church to his teaching it. If it has not been taught or much taught by the pursuer, it would rather appear to be because there were few, if any, who cared to learn, and if any one did so, there seems to be no reason to doubt he would have been taught. It is, as it was well put by the pursuer's procurator, no reason for refusing a minister his stipend that people will not avail themselves of his ministrations, if he is able and willing to perform his duties. Still less does it seem to the Sheriff-Substitute any reason for refusing the pursuer the small salary attached to his office, that the children under his care were not generally in a position to make the acquisition of the one branch of Greek of importance to them.

The Sheriff-Substitute is not aware of there being any authority for the statement that the teaching in a grammar school is necessarily to the exclusion of the elementary branches. It may usually be so, for many reasons, but there does not seem to be anything in the nature of a grammar

school to make the teaching of the elementary branches inconsistent with proper grammar school teaching.

If, again, leaving particulars, the argument of the defenders to the unfitness or inconsistency of the pursuer's position as master of the grammar school and Free Church teacher is considered as a whole, it appears to the S.S. to fail altogether. This is not the question of the appointment of a Free Church schoolmaster to an office of large emoluments and burdensome duties. The annual income is very small indeed, and the question is, not whether the pursuer occupies the same position and does the same work as the rector of a grammar school in a large town, where there is ample field for the occupation of his whole time in teaching the proper branches of a grammar school, but whether he fills the position of grammar school teacher in a small place, with hardly any pupils to whom these branches are to be taught. If he was to do nothing else, his work would be very small indeed; and if he had no other source of income he would starve. It is only by the union of the burgh schoolmastership with something else that its existence is possible; but by this union it can exist, and make the teaching of the proper grammar school branches a certainty, if any one wishes to study them, which otherwise it would by no means be.

(2.) If, then, the pursuer was the proper teacher of a proper grammar school, the question will arise, how far he is entitled to the funds sued for. It does not appear to be disputed that if the pursuer is the master of the grammar school, he is entitled to the interest of the Stonefield mortification; but the principal of the 1000 pounds Scots mortification is denied on record to have been ever held by the defenders, and was stated in the course of the debate to have been lost. Its existence in the defenders' hands is clear from many minutes, both of Kirk-session and Town Council specially to take a modern one from the Kirk-session minute of September 17, 1828. As regards its loss, the S.S. cannot find any statement to this effect on record, and even if there were one, it does not appear to him to be any evidence of it. The session appear to have taken a bill in 1828 from Duncan Paterson for £188, which consisted in part of the principal of this mortification, in part of other moneys. Of that they received back at least £100, as appears from their minute of 4th March, 1829, and they farther appear, from their minute of 14th June, 1847, vol. vii., page 46, to have assigned the remainder to the parochial board. It does not therefore appear certain that they lost any of it; and even if they did lose this latter sum, the mortification was so mixed up with other moneys in their hands as to be specifically undistinguishable, and they cannot therefore be allowed to impute any loss they may have sustained to the mortified money.

The S.S. has little doubt that the pursuer is entitled to require that by-gone interests shall be accumulated, and the interest of this paid to the master of the grammar school. It is clear that the interests have not been spent, and must therefore, so far as not spent, be accumulated. There is no allegation that this is an improper course to follow, nor is there any proposal to apply the interest rising from these accumulated interests in any other way in conformity with the object of the mortifications, if indeed that is possible, for though the terms of the mortifications are lost, the interest rising from them appears to have been invariably used for the payment of the salary of the teacher of the grammar school.

As regards the precise sums to be paid, the pursuer has now put in a minute restricting his claim to the interest of the principal and accumulated sums in the hands of the Kirk-session from 1836, so that £25 will fall to be deducted from the sum claimed, to be regarded as principal under the old mortification, leaving a balance on that head of £210 19s 7d, and a sum of £30 in the same way from the principal of the Stonefield mortification.

The defenders also claim a deduction of £32 3s 3d for extra judicial expenses in the previous case with regard to this mortification. Whether they would be entitled to deduct it or not, is a question the merits of which the S. S. does not think it necessary to decide, for there has been no account of the expenses produced in process, and it is impossible for him either to take the bare statement of the defenders as to the total amount of this account as evidence, when the details and vouchers must have been all along in their possession, or allow further proof when the parties have renounced farther probation.

The S. S. has not had the deduction of £61 19s claimed by the defenders explained to him, and he therefore cannot take it into account at all. The defenders, pleading in the answer to the third article of the condescendence, where this claim is made, is very unsatisfactory, from its want of any explanation at all in some cases, and of any proper one in others, of the grounds for claiming the various deductions mentioned in the article, and as no verbal explanation, so far as he understood, was given of this particular claim, either at the debate or at the special hearing, he ordered on this article, his only course is to disregard it entirely.

The pursuer has, in his minute of restriction, withdrawn his claim to the £12 10s paid on 11th November, 1832, and accumulated interest thereon, and to £15 2s 6d of £20 paid on 20th November, 1835, also with accumulated interest thereon, amounting in all to £99 17s, the S. S. considers he is entitled to the interest of the balance, which amounts to £442 14s 10d, as mentioned in the summons, at the rate of five per cent. for the period, which will come to £11 1s 6d as the sum due to him under the mortifications.

The defenders appealed and reclaimed against the foregoing decision, and the following is the interlocutor of the Sheriff Principal:—

Edinburgh, 15th January, 1870.—The Sheriff having considered the appeal and reclaiming petition for the defenders, and whole process, adheres to the first three findings of the interlocutor appealed against, and, *quoad ultra*, appoints the pursuer to answer the petition within fourteen days.

Note.—The bulk of the petition, from p. 27 to p. 75, is taken up with arguing against the first three findings of the interlocutor, but the Sheriff is not moved by the reasoning of the defenders, and considers the S. S.'s view to be sound. There seems nothing in principle to prevent the magistrates of a burgh, too small to support a purely civic grammar school, adopting an existing school, be it parochial, or adventure, or Free Church, and making it the burgh school, giving it the benefit of the support and contributions of the burgh, on condition of the higher branches of instruction proper to a grammar school being taught. It may well be that this support may prevent the school in question, under Privy Council regulations, degenerating into a mere elementary school.

The objections do not seem of force. The magistrates may not have the

sole management, but they, as contributors, will naturally have some voice, and if they are satisfied with the management as controlled by Government inspectors, the defenders have no reason to complain. The want of stability is merely a speculation. It might equally have been pleaded formerly when the grammar school was in union with the parish school, and held its school-house precariously at the will of the heritor, who ultimately ousted it. It is vain to speculate on the various possible casualties which may bring this school to an end. At present, and during the period sued in regard of, the school was carried on by the pursuer *bona fide*, and he is, therefore, entitled to the emoluments properly attaching to his office. It would have been different if the Town Council had appointed an illiterate tradesman who kept no school, or a teacher who was not competent to teach and did not teach anything above elementary branches.

Neither is there any good objection from the school being a denominational one. It is not more so than the parochial school, and conducted as both parish and Free Church schools notoriously are, they are freely attended by all classes of the community, without any idea of proselytising or that attendance on the school involves any attachment to a religious denomination. This is very clearly brought out in the reports of the Education Commissioners.

It is said that the appointment of a burgh teacher is *ad vitam aut culpam*, and that any limitation on this tenure is illegal. But this is a matter which is *jus tertii*. If the pursuer does not insist on a life tenure of office, it is surely not for the defenders to do so, for the Commissioners, while they report that the life tenure is the legal one, also report that it is very injurious to the efficiency of the schools—3d Rep., p. xii. The limitation, at worst, won't vitiate the appointment, it would only be held *pro non scripto* in a question between the burgh and the pursuer.

Before disposing of the appeal, as regards the other findings of the interlocutor, the Sheriff wishes the pursuer to answer the reclaiming petition from p. 75 to the end.

And the pursuer having answered the reclaiming petition for the defenders, the following and final interlocutor was pronounced by the Sheriff-Principal:—

Edinburgh, 15th February, 1870.—The Sheriff having resumed consideration of the appeal and reclaiming petition for the defenders, with the answers for the pursuer, and the whole process, adheres to the remaining findings of the interlocutor appealed against and dismisses the appeal; Finds the defenders liable in additional expenses as the same may be taxed, and decerns.

Note.—The Sheriff has now considered, with the aid of the answers, the remaining points of this case.

There appears no doubt that a sum of £1000 Scots was either mortified or in some way placed in the hands of the Kirk-session as trustees, that the proceeds might be paid over for behoof of the grammar school. This is not the case of a mere grant made annually by the Kirk-session, and which, however long continued, they were under no obligation to make, and might withdraw at any time. But in the earliest notice of it in the session records in 1656 it is referred to as a capital sum *bearing* interest thus, "the annual rent of the school money," and again in 1658 and 1660 the foundation is referred to as "the bond payable by the captain of Inch-

connel for maintaining the Doctor of the grammar school of this town," and "the school money appointed for paying the Doctor of the grammar school of Inveraray," and again by the copy bond in 1774 the same sum appears to have been lent out and taken, payable to the Kirk-session, "to the behoof and for the use of the grammar school of Inveraray. It is of little consequence to inquire whether "Doctor" originally meant simply teacher or an "ecclesiastical functionary" for no mention is made of Doctor in the records for the last century and a half, and the interest has invariably been paid to the teacher, it being now for the first time proposed to withdraw the interest from the school, because there is no longer a "Doctor" in the alleged old sense of the term. The later form of bond did not mention the "Doctor" but the school only; but *de facto* authority was always given to the teacher to uplift the interest.

No doubt can exist as to the Stonefield mortification. We have copies of two of the bonds taken as its investment, 1773 and 1785. From the earlier one it appears the Kirk-session were "trustees and fide commissaries for the use and behoof of the schoolmaster of the grammar school of the burgh of Inveraray and his successor in office." The practice has been consistent with this.

The Stonefield mortification was lent to the Town Council in 1805, and from this and the separation of the parochial from the burgh school which, was going on from 1830 to 1851, these old endowments of the latter appear to have been lost sight of. Even when in 1842 a settlement of accounts was arraigned between the Town Council and Kirk-session, it does not seem to have been in view that the bond due by the former was for the Stonefield mortification.

The pursuer sues for interest from 1830, but by minute (No. 40) of process he admits that the Kirk-session paid interest up to May, 1836. The defenders claim £65 alleged to have been paid by their predecessors as interest up to 1848, and ask to be allowed a proof. But no specification is given on record of how, or when, the sum in question was paid. The pursuer has admitted £25 paid on account of one bond, and at least £15 2s 6d under the other, and the sum (*viz.*, £40 2s 6d) must form part of the alleged £65. The Sheriff cannot suppose a parole proof is pointed at, and as a full production of books and documents has already been made, he is not inclined, at this stage of the case, and when the Sheriff-Substitute was given to understand that farther probation was renounced, to allow the parties to enter on a new career of proof. Besides, he stated in the note to his interlocutor, in the case with the town council, that he was satisfied that the salary of the burgh schoolmaster after 1835 did not include the £9 3s 4d of interest of the mortifications in question, and therefore, if the Kirk-session paid any interest, it must have been to the English or parish schoolmaster, or in some other way not warranted by the terms of the mortifications.

As to the claim of the defenders to retain the extrajudicial expenses of the litigation with the Town Council, the Sheriff, independent of no account having been lodged, does not think them entitled in this way to diminish the educational fund in their keeping. They were quite as much to blame as the Town Council for the confusion regarding these mortifications. It appears that they even assigned them to the parochial board as being

poor's funds, and they did not keep the old mortification distinct, but massed it with other funds. Even when suing for the Stonefield Bequest, they did not disclose that it was a school endowment, and the Sheriff had to guard his decerniture carefully to insure their so holding it.

These funds are not yet invested separately, and until this is done five per cent. is the proper interest chargeable against the defenders; and the accruing interest not used for school purposes must be accumulated with the capital, as there is no other legitimate use it could be put to.

It is much to be hoped that, as this long series of litigations has ended in clearing up matters, both as regards the grammar school and the endowments, all will go on smoothly in time to come. Lord Cowan's award in 1851 set up the parochial school under parish patrons, and relieved it from civic control, and now these judgments have set up the burgh grammar school in the only way it could be carried on, and have ascertained the mortifications applicable to its effect, which ought now to be securely invested in a separate form, that the interest may be regularly paid to the teacher in time to come.

Act.—D. Macniven.—Alts.—Wilson & Douglas.

English Cases.

ACTION—*Right to support where land supported by water contained in spongy soil—Rights of owners of adjacent lands derived from common grantor.*

—The owner of a piece of land of a wet and spongy character, in the neighbourhood of a town, conveyed a portion of it to plaintiff, with a stipulation that buildings of a certain aggregate value should be erected upon it. He subsequently conveyed the remainder of the land to persons, from whom it came to church trustees, who employed defendant to build a church on it. To obtain a firm foundation for the church, defendant was obliged to excavate to a considerable depth, the effect of which, from the spongy nature of the soil, was to drain off not only the water in the land on which he was excavating, but that in plaintiff's land, and to cause plaintiff's land and certain cottages which he had built on it without draining it, to subside and crack. His land would have subsided even if it had not been weighted with cottages. Defendant was guilty of no negligence or unskillfulness—*Held*, that defendant was not prevented from draining the land by any general principle of law nor by any covenant in plaintiff's favour on the part of the common grantor of the lands, to be implied from the doctrine that a man cannot derogate from his own grant.—*Popplewell v. Hodgkinson*. 38 L. J. Exch. 126.

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IS THE TENURE OF FEU NOT A FEUDAL TENURE?

IN the discussions to which the Lord Advocate's Bill "To Abolish Feudal and Burgage Tenure, and to amend the Law relating to Land Rights in Scotland," has given rise, an assertion has frequently been made that it is an error to call the Tenure of Feu a Feudal Tenure, because it was truly derived from the emphyteusis of the Roman law, and not from the Feudal law. This theory was first distinctly put forward by Lord Curriehill, in an address to the Social Science Association in 1863, and the number of times that it has since been repeated without proof, and allowed to pass without challenge, is an unfortunate sign of the neglect of the history of our law even by well educated lawyers. Its adoption in the recent report by a Committee of the Faculty of Advocates, affords a good opportunity for its examination.* In freely criticising this theory, the present writer trusts that he will be acquitted of want of respect for the able Judge who sanctioned it, than whom few in modern times have left behind a more solid reputation. He will perhaps be remembered as the last Scotch feudalist, but it is no injustice to remark that his strength lay in the application of feudal principles to particular cases rather than in tracing their origin, and that he was not free, as several of his elaborate judgments shew, from the love of paradox, a failing which often besets strong intellects. The theory now to be examined is thus stated in the Report above alluded to, in terms for the most part borrowed *verbatim* from Lord Curriehill's address:—"It is an error, though a common one, to suppose that the tenures by which these various estates are held are the tenures of the antiquated feudal system. The connection between the parties is not that of superior and vassal,

* The Report of the Committee of the Writers to the Signet adopts the same statement from the same source. It is significant of the rapidity with which error spreads, that seven years after its promulgation by Lord Curriehill, it should find its way into the official documents of Committees of these two learned bodies. The Report of the Commissioners of 1838, on the other hand, throughout treats feu-farm as a feudal tenure.

in the sense in which these were used in that system; for under it the vassal held the land as a benefice or a fee for military or other services, without any feu-duty or other yearly returns being payable to the superior. The tenure was termed ward-holding; and the right of the vassal was not a commercial subject. The tenure of feu-farm was quite unknown to the feudal system, and was not consistent with some of the conditions of the proper feudal tenure. It was gradually established in Scotland only by a series of statutory enactments between 1457 and 1748, and, instead of continuing, it supplanted the feudal tenure. The tenure of feu-farm, indeed, instead of being a feudal one, originated and was matured in the jurisprudence of Rome, and became an institution of the empire under the name of *emphyteusis*. Under this tenure, as well as under *bleinch* tenure, land is almost quite free from the trammels of feudalism. The superiority or *dominium directum*, and the *dominium utile* and the mid-superiority, where it exists, can each be sold or burdened by its owner at pleasure, without the consent of the other parties to the contract. And this legal characteristic of the tenure is of great commercial importance, as it renders land available for the purposes for which it may be best adapted." It would not be fair to insist much on the strange inversion of the historical order of events contained in the statement that the tenure of feu-farm described in the immediately preceding paragraph as having originated in Scotland only in 1457,* became an institution of the Roman empire under the name of *emphyteusis*, which received its definition and form from the Emperor Zeno, who reigned from 474 to 491 A.D., as this statement is only an inaccurate mode of expressing the theory that feu-farm was derived from *emphyteusis*, but since it is here that one of the sources of error lies, we shall be pardoned for considering what the Roman *emphyteusis* was, and what was its true relation to the feudal tenure. It had become the practice at an early† period of the Western empire for municipalities to grant portions of their lands both for agricultural and building purposes,‡ on condition that the grantee should pay a fixed annual sum. These grants were sometimes for a term of years, sometimes in perpetuity; in the latter case they descended to heirs, and could be alienated, and the person in right of the grant could not be deprived of it so long as the annual payment was made. "*Hac lege locantur*," says Gaius, "*ut quamdiu inde vectigal præstetur neque ipsi conductori neque heredi ejus*

* This statement will presently be shewn to be itself incorrect. The tenure of feu was known in Scotland at least as early as the twelfth century.

† The first definite mention of *agri vectigales* is in the reign of Hadrian, 117-138 A.D., but they were probably known earlier. See Savigny, *Recht des Besitzes*, p. 120.

‡ Where the grant was only of the surface of the ground, it became known later under the name of *superficies*. The agricultural purpose was often and perhaps originally always the reclaiming of waste land, but there is no reason to suppose this contract to be even the usual case of *emphyteusis*. According to the current opinion on the Continent, however, the derivation of *emphyteusis* is ground granted for planting.

prædium auferatur." Gaius, 3, 145.* The land, when let in perpetuity, was called *ager vectigalis*, from the annual payment, *vectigal*.† The prætor, in the exercise of his equitable jurisdiction, gave such lessees the remedy of the interdict *de loco publico fruendo*, and also a real action, *utilis rei vindicatio*, by which they might vindicate the subject, not only against any wrongous possessor, but also against their lessors, the municipality (see Dig. 6, 3, 1). The extent of these remedies gave rise to the question, whether such a contract should not be deemed a sale rather than a lease, but the opinion of the jurists was that the latter was its true character.‡

A similar institution arose in the Eastern empire under the name of *emphyteusis* (i.e., a right engrafted upon the right of property), by which the property of sacred and civil incorporations as well as of private persons was let in perpetuity for an annual payment, called *canon*.§ The Emperor Zeno, by a law embodied in Justinian's Code (Cod. iv. 66, De jure emphyteuticario), declared this contract to be neither a proper sale nor a proper lease, but to be fixed in its character by special agreement in each case.|| This contract, in the legislation of Justinian, superseded and absorbed that of the *ager vectigalis*, and became the law both of the Eastern and Western empire. Its leading characteristics were,—(1) The annual payment of a *canon* or *pensio*; (2) a right of pre-emption within two months on the part of the dominus, or for the renunciation of this right a fine of two per cent. on the price (*laudemium*); (3) an action of irritancy (*privatio*) competent to the dominus in the event of the non-payment of the canon for three years. The *emphyteusis* of the civil law was adopted by the canonists, and largely used as a tenure for church lands, with modifications favourable to the churchmen, who stipulated for an irritancy on two instead of three years non-payment of the canon.¶ This

* Probably in the time of Gaius, the *emphyteusis* only passed to heirs, not to singular successors, but in the Institutes of Justinian the right of alienation is clearly recognised—"Quamdiu pensio sive redditus pro his domino præstetur neque ipsi conductori neque heredi ejus cuive conductor heredes ejus id prædium vendiderit aut donaverit aut dotis nomine dederit aliove quoquo modo alienaverit, auferre liceat."—Inst. iii. xxiv., 3.

† *Agri civitatum alii vectigales vocantur alii non. Vectigales vocantur qui in perpetuum locantur. . . . Non vectigales sunt qui ita colendi dantur ut privatim agros nostros dare soleamus.* Dig. vi. 3, 1.

‡ "Non efficiuntur domini," is the expression of Paulus, Dig. 6, 1, 1. "Sed magis placuit," observes Gaius, "locationem conductionemque esse."—Gaius, 3, 145.

§ Or in Latin, sometimes *pensio*.

|| See Inst. iii. xxiv., 3. Also see Rubric of Digest, 6, 3, Si *ager vectigalis id est emphyteuticarius* petatur. "Justinian hat dieses Recht bestimmt zwar nur beyläufig aber doch so deutlich dass kein Zweifel darüber seyn kann. Er will dass die neue *emphyteusis* ganz die Rechte haben soll welche der alte *ager vectigalis* gehabt hatte, d. h. dass jetzt bei dem Erbpacht dasselbe gelten soll was vorher den erblichen oder temporären Pachtungen der Municipalgüter gegolten hatte."—Savigny Recht des Besitzes, 123.

¶ Savigny Geschichte des Römischen Rechts, 2, 213, gives an instance of it in an *emphyteusis* granted by a Bishop of Modena in A.D. 811. See Muratori Antiq. Ital. 5, 957. A capitulary of Charles the Bald, A.D. 876, mentions *emphyteusis* as a common tenure of ecclesiastical property. Walther Corpus juris Germanici, iii. 193. See also Eichhorn Deutsche Staats und Rechts Geschichte, 2, 368. And above all, the

shortening of the period of irritancy was introduced by Justinian Novella, 7, 3, 2. See also Novella, 120.

To this tenure of emphyteusis the best authorities on the history of European law ascribe the division of property into two estates, *dominium directum* and *dominium utile*,* which forms the leading principle of the feudal system. Nor can there, we think, be any doubt that the Teutonic conquerors, while they gave to that system from native sources its military aspect, borrowed its formal legal character from the jurisprudence of Rome. The views of Mr Maine† on this subject are so instructive that we quote them at some length:—"The truth is, that the emphyteusis, not probably as yet known by its Greek designation, marks one stage in a current of ideas which led ultimately to feudalism. We have therefore in the emphyteusis a striking example of the double ownership which characterised feudal property, and one, moreover, which is much simpler and more easily imitated than the juxtaposition of legal and equitable rights.‡ The history of the Roman tenure does not end, however, at this point. We have clear evidence that between the great fortresses which, disposed along the line of the Rhine and Danube, long secured the frontiers of that empire against its barbarian neighbours, there extended a succession of strips of land, the *agri limitrophæ*, which were occupied by veteran soldiers of the Roman army on the terms of an emphyteusis. There was a double ownership. The Roman State was landlord of the soil, but the soldiers cultivated it without disturbance so long as they held themselves ready to be called out for military service whenever the state of the border should require it. In fact, a sort of garrison duty closely resembling that of the military colonies on the Austro-Turkish§ border

tract of Anselminus de Orto, "Super Contractibus Emphyteosis, et Precarii et Libelli atque Investiture," written not later than the beginning of the twelfth century, which proves that, at that date, emphyteusis and the analogous contracts mentioned in its title, were the common tenures of church lands in the north of Italy.

* The utilis vindicatio, competent to the emphyteuticarius possibly gave rise to this term, but its origin is a subject much disputed, and not yet ascertained.

† See also Hallam, Middle Ages, 1, 316; Palgrave, English Commonwealth, 208. Meyer Inst. Judic. 1, 187. Hallam, in the passage above cited, justly condemns Palgrave's derivation of the word feudum from the word emphyteusis. The most probable derivation is *feh* (pay), and *odh* (property), which is supported by the analogy of all (full), *odh* (property), whence allodial, and by a transposition of the radical elements, the Shetland *udal* tenure, as well as by the double sense of *fee* for payment and for an estate in land.

‡ This refers to a previous part of Mr Maine's argument, in which he proves that the distinction between *dominium directum* and *utile* was not derived from that between Quiritarian (or legal) and Bonitarian (or equitable) property. Exactly the same question has been disputed between two great German jurists, not as to the feudal tenure, but as to emphyteusis. Savigny originally supported the view that the holder of emphyteusis had a right of property similar to the *dominium bonitarium*. Recht des Besitzes, 2 Auflage, 99-109. This view was opposed by Thibaut, Abhandlungen, No. xi., and afterwards abandoned by Savigny himself.

§ Similar causes produce similar effects. So the Turkish Sultans had a tenure of the same kind. "Solet Imperator Turcicus regionem bello occupatam præcipue in finibus imperii qui hosti objacent viritum inter suos milites dividere in multas partes et prædia dissectam (quæ Timarrias vocat) et militibus colendam tribuere sub eâ lege ut ad omnes expeditiones certum numerum equitum paratum habeant pro quantitate et bonitate

had taken the place of the quit-rent, which was the service of the ordinary emphyteusis. It seems impossible to doubt that this was the precedent copied by the barbarian monarchs who founded feudalism. It had been within their view for some hundred years, and many of the veterans who guarded the borders were, it is to be remembered, themselves of barbarian extraction, who probably spoke the Germanic tongues. Not only does the proximity of so easily followed a model explain where the Frankish and Lombard sovereigns got the ideas of securing the military services of their followers, by granting away portions of their public domains, but it perhaps explains the tendency which immediately shewed itself in the benefice to become hereditary; for an emphyteusis, though capable of being moulded to the terms of the original contract, nevertheless descended as a general rule to the heir of the grantee."*

The important deduction to be made from the foregoing historical survey, as regards the question we are considering, is that when our ancestors, in common with most of the northern nations, adopted the system of feudal in preference to allodial tenure, they adopted a system based upon the Roman emphyteusis. It is a mistake, therefore, to say that Feu-farm only was derived from emphyteusis—the tenures of Ward, Frankalmoigne (*libera eleemosyna*), by which ecclesiastics held their grants, Blench farm, and Burgage (by which royal burghs held their grants), had all an element derived from the same original.

But next let us examine the statement that feu-farm was first introduced by the statute 1457, c. 71, and was taken directly from the Roman emphyteusis. This view is the result of an ignorance of the early history of Scotch tenures, which is not perhaps surprising, as they rarely now come before the practising lawyer, and have only recently, in many cases, been made accessible to the student. Yet enough has always been known to have warned any one who has dipped into the history of our law against this error. Feu-farm was known in Scotland at least as early as the *Leges Burgorum*, which belong in great part to the reign of David I. (1124-53), and no part of which have ever been assigned to a later date than 1295. The 95th section of these laws, which are the earliest complete† body of Scotch law extant, bears the express

Timarrie decima etiam parte fructuum Imperatori reservata."—Craig, 1, 4, 6. This tenure, however, was more akin to that of the *Zemindars*, to whom the Mohammedan conquerors of India granted the land on payment of a fixed share (nominally 50 per cent., practically much less) of the produce.

* Maine's *Ancient Law*, 908, *et seq.*—The tract of Anselminus de Orto (son of Obertus de Orto, one of the authors of the *Libri Feudorum*) affords an important corroboration of this view. When this writer in the commencement of the twelfth century compares the emphyteusis of the Civil Law with the investiture of the Lombard Feudal Law, he points out as the only essential distinctions between them that the investiture required symbolic tradition, and excluded females from succession. They were both grants of land for an annual payment and in perpetuity. The *precarium* and *libellum*, on the other hand, were leases for fixed terms, though in most cases renewable.

† The laws of the Brets and Scots are a fragment only, and a fragment of Celtic law.

title, *De terris datis ad feodofirmam*,* and its object was to reserve a right of pre-emption to persons who sold land to be held by this tenure. It enacts—"Statutum est si quis dederit alicui terram suam ad feodofirmam salva sibi et suis quadam firma nominata et postea feodofirmarius necessitate compulsus voluerit dictam terram vendere, ipse qui dedit dictam terram ad feodofirmam et sui erant propinquiore ad dictam terram emendam quam aliquis alius." From a fragment of old burgh law of uncertain but old date, entitled, "Distinctio inter feodofirmarium et firmarium," it appears that feu-farm was not confined to royal boroughs, and that subinfeudations were prohibited. This passage is of peculiar interest as pointing to a time when feu-farm and burgage were not distinguished:—"Item feodofirmarius non potest firmarium facere de aliqua terra nisi prius reddatur capitali domino et ipse faciet illum firmarium. Et tunc primo ille firmarius habebit libertatem burgi quia duo homines simul et semel non possunt habere libertatem burgi de uno et eodem burgagio."† It cannot, however, be alleged with truth that this tenure of feu-farm, in which a certain payment took the place of the military service of Wardlands, was confined to land within burghs and resulted solely in burgage tenure. There are distinct traces in our old charters of this tenure being known from the twelfth century downwards in lands not within as well as within burgh. Thus, in the register of Kelso,‡ of a date not later than 1180, there is a grant by John Abbot of Kelso, with consent of the chapter, to Osbern and his heirs, of half a carrucate of land within the territory of Middleham, where the reddendo is eight shillings yearly, half at Whitsunday and half at Martinmas, with three days' peat service of two men and three days' ploughing.§ In 1204 there is a grant by William the Lion in favour of Malcolm, Earl of Fife, as heir-nominate of Uchtred of Bingoner of the lands of Bingoner, "to be held by him and his heirs, of me and my heirs, in feu and heritage, justly, fully, and honourably rendering therefrom the rent which to that land pertains; to wit, four chalders of oatmeal, and four merks, and four

* This tenure is to be compared, as it has been by Erskine, with the English soccage, and it deserves remark that while in France and Germany there are traces of Roman emphyteusis having descended to modern times (see as to France, *Toullier Droit Civil*, 111-95; and Germany, *Arndt. Pandekten, Vierte Auflage*, 195) there is no such trace in England or Scotland. See also Vuy "De Origine et natura juris emphyteutici," Heidelberg, 1838). Soccage is defined as "the tenure where a tenant held by certain service for all manner of services provided such service was not knight-service, as where a man held his land by fealty and certain rent for all manner of services, as held by homage, fealty, and certain rent for all manner of services; or if a person held by fealty only: in short, every tenure which was not a tenure in chivalry was tenure in soccage." — Reeves' *History of English Law*, ch. xxi., Finlayson's ed. ii., p. 555. Tenure in burgage was a species of soccage which was where there was an ancient borough and those who had lands therein held them of the king or of some lord by a yearly rent." — *Ibid.*, p. 558.

† *Fragmenta Collecta Act Parl.* i. 357.

‡ For this, and the following early samples of feu-farm, I am indebted to Mr Rodger's *Feudal Forms Viewed Historically*. Grants of land for payment of a certain sum of money were a known form of the Anglo-Saxon feudal tenure of Bocland.

§ Register of Kelso, 117 and 470.

pair of , or *eight shillings, and performing the forensic service* which to that land belongs."* About 1226 there is a Charter of Resignation by Hubert Abbot of Kelso, with consent of the Chapter, in favour of Reginald Wood and his heirs, of the lands of Easter Duddingston, with half the peat moss of Cameron, and the reddendo, is "*ten merks of silver, at two terms*, five, to wit, at the nativity of St John the Baptist, and five at Martinmas, *and performing the forensic service* to the lord the king and to me, so far as pertains to the third part of one town."† A similar reddendo is proved to have been the tenure of the lands of Draffane, held of the same monastery by a receipt dated July, 1271.‡

About 1300 there is a feu-charter by Alan, perpetual vicar of the Church of Glasgow, with consent of the Chapter of the Church, to Sir John of Carrick, of certain lands within the burgh of Glasgow, in feu-farm, "rendering therefrom yearly to me and my successors' sacristans *three shillings of silver*, to wit, 18 pennies at Whitsunday and 18 pennies at Martinmas, and so on from year to year, and term to term, *payment shall be made of the said feu-farm for ever.*"§ So in a charter of Robert the Bruce, of uncertain date, there is a reddendo of *eleven pounds of sterling*s, at the term of Whitsunday and Martinmas by equal portions, and *performing the forensic service of half a knight*,|| which, as well as several of the deeds previously quoted, are examples of a combination of feu and ward tenures. About 1360, there is a charter of confirmation by John Graham (de Gram), Lord of Tarbolton, of two grants by his grandfather in favour of Henry of Graham, his uncle, of certain lands in the barony of Abercorn, and of the land of Blyth in Tweeddale, to be exempt from ward and relief, rendering yearly "for the land of Blyth *two gilt spurs, or at the pleasure of the said Henry and his heirs and assignees, 12 pennies of sterling*s in name of feu-farm, and one penny only for the lands of Maxeston and Philipston in name of feu-farm," a reddendo, no doubt, approaching to blench-farm, but distinguishable from it by the absence of the words "if asked only," and by the express designation of feu-farm applied to it. In 1402, there is a charter in feu-farm, with a reddendo of £3 yearly, of the lands of Camieston, by James Frame of Frendraught, to the Abbot and Chapter of Melrose,¶ which was confirmed by James I. in 1425.**

Finally, the statute 1457, c. 71, itself affords conclusive evidence of the pre-existence of feu-farm holdings, for it was passed to remove

* Act Parl. i. 68. In this, and some of the following examples where there is a reservation of forensic service, as well as a money payment, the tenure would, under our old law, have been deemed ward; but they are not on that account to be disregarded as evidence of the introduction of the tenure of feu. "The truth is," observes Mr Walter Ross, "that from the conquest of England downwards we meet with tenures of every imaginable kind; with deeds granted for money, and for a great variety of considerations, as well as for military service."—Lectures, ii. 147.

† Register of Kelso, 456.

‡ *Ibid.*, No. 474.

§ Register of Glasgow, No. 254.

|| Reg. Mag. Sigill, No. 13.

¶ Liber de Melros, No. 504.

** *Ibid.*, No. 594.

the hardship to which those who held portions of the Crown ward-lands in feu were subject by falling under ward on the death of the Crown vassal, and provided that in that case the holder of the feu-farm should* "remane with his feu-ferme unremovyt, payande to the king siklike ferme endeurende the warde as he did to the lorde, so that it be set to a competent avail."

Reference has been made to the institutional writers in favour of the doctrine that feu-farm is the Roman emphyteusis, but when referred to, their language is in marked contrast to that used by the advocates of the modern theory. What they in substance say is, that the tenure of ward is the most proper feudal tenure (and so it was to be implied in cases where the reddendo was doubtful); that the tenure of feu resembles in several particulars the emphyteusis, more particularly in its substitution of a money payment or other certain return for the military and other personal service of ward tenure, and in the remedy of irritancy ob non solum canonem, introduced by 1597, c. 250 in favour of the superior in feu right.

Thus Craig, in treating of the definition of feudum observes, that if services were to be considered essential to the existence of a fief, neither feu nor blench tenure would be included under it, which affords an instance of the danger of definition in law. The proper feudal grant, he remarks, was a donation, but he does not deny that where a price was paid, the tenure was still feudal, although he calls it a degenerate form, "*Quod enim interveniente pecuniâ vel mercede conceditur feudum degenerans sive Feudastrum dici potest.*"† So in his division of feudal tenure, the same author adopts a quadripartite one into—(1) Militare; (2) Blancum; (3) Burgale; and (4) Ecclesiasticum, in preference to the tripartite proposed by Sir David Macgill, King's Advocate, into—(1) Commune (including under it Militare, Burgale, and Ecclesiasticum); (2) Francum; and (3) Emphyteuticum. Though his language is wanting in precision, Craig apparently regards feu-farm as an improper species of the military fief, for he discusses the question whether, when by an error the tenure is enforced in the charter as being for "*summae alicujus præstatio*," or "*servitium unius comitis*," with the addition "*nomine blanci or feudi franci*," it should be deemed blench or ward (commune), and he decides in favour of the latter.‡

Sir G. Mackenzie, in his title "of the several kinds of holding," commences with the distinct proposition, "The first division of feu from the several kinds of holding is that some lands hold ward, some feu, some blench, and some burgage;" and in regard to feu, he remarks, "This holding has some resemblance with the emphyteosis in the Roman law, but it is not the same with it, for emphyteosis was a perpetual location containing a pension, . . . but our feu holding comes from the feudal law (whereof there is no vestige in the civil

* See 1457, c. 71, Act Parl. 11, p. 49.

† Dieg. ii. 1, 15.

‡ Dieg. i. 10, 29.

law) and passes by infestment to heirs.”* Lord Stair is, as usual, concise and precise: “The property of all lands and immoveables or hereditaments is either allodial or feudal Now there remains little allodial, for lands holding feu, or blench, or burgage, or lands mortified are not allodial, seeing they acknowledge a superior having the direct right of property, and to whom there must be some rent in return, though they be not so proper fees as land holding ward.”†

The language of Erskine is of similar import: “Though the body of the Roman law was finished before the feudal law had its existence, Craig and other writers, with great propriety, express a grant of feu-farm by the Roman vocable *emphyteusis*; for on comparing the two rights a *close resemblance* must appear between them in their most essential characters.”‡

The true statement of the origin and position of the tenure of feu-farm may be summarised in a few sentences.

I. The tenure of feu-farm shares, with all the other feudal tenures, ward blench, mortification (*frankalmoigne*), and burgage, the characteristic of a division of the full right of property into two separate estates (*dominium directum* and *dominium utile*)—a division which the feudal system, it is probable, copied from the *emphyteusis* of the Roman law.

II. It did not originate in the fifteenth century, when the decline of the feudal system had commenced, but at least as early as the twelfth, when that system was in full vigour.

III. It more closely resembled *emphyteusis* than the other feudal tenures in the adoption of a certain annual payment or return due by the owner of the *dominium utile* to the owner of the *dominium directum*, and in the remedy of an irritancy *ob non solutum canonem*,§ but,

IV. It retained and still retains the following marked characteristics

* Observations on 1457, c. 71. Mackenzie's Observations on 1597, c. 250. “Non solutio pensionis per biennium in civili *emphyteusis* et per triennium in ecclesiastica efficiebat ut *emphyteuta* a jure suo caderet,” is an error—the irritancy in the ecclesiastical *emphyteusis* being in two, the civil in three years. Craig, whose learning is extensive rather than exact, did not know the reason of this, for after noticing that a clause of irritancy had been usual before, and that the statutory irritancy “in *potentis comitiis* apud nos introductum est,” he adds, “et quod magis mirum est tempus coarctatum ad biennium.” Craig's *Jus Feudale* was completed in 1603, but not published till after his death in 1650, by Robert Baillie. Several instances prior to the statute of irritancy for non-payment of two years' duty will be found in Balfour, 171.

† Stair, ii. 3, 4. Cf. iv. 334. “Infestments feu are like to the *emphyteoses* in the civil law, which was a kind of location therefore, these feu-holdings partake both of infestments, as passing by seisin by heirs for ever, and of location, as having a pension or rent for their reddendo.

‡ Ersk. Inst. ii. iv. 6.

§ A writer who has done much to elucidate the history of our law, has well expressed the view here presented:—“The Scottish feu-hold is the Roman *emphyteusis* executed in the forms of the feudal law, and regulated in all other particulars by the maxims of that jurisprudence in the same manner as the socage tenures of England. The rent payable by the tenant being substituted in place of the ancient military services is a feudal duty recoverable by the same methods as the other duties or casualties incident to feudal tenures.”—W. Ross' Lectures, ii. 398.

of feudalism—(1) the casualties due on each change of ownership, whether by succession or transmission to a singular successor; relief being due to the superior for the acknowledgment of the heir, and composition* being due as a substitute for the right originally possessed by him of refusing an entry to a singular successor; (2) The declarator of non-entry where the person in right of the *dominium utile* neglected to complete the feudal right; and (3) The names and relation of superior and vassal, which are not a mere theoretical nomenclature, but have the important practical consequence that the estate or right of the vassal is deemed a burden on the right of the superior whose title is a title to the lands, and not merely to a right or burden of superiority; and (4) The practice of subinfeudation, of which there is no trace in the emphyteusis either of the civil or the ecclesiastical law. I have refrained purposely from all reference to the controverted question whether it is advisable that this tenure should continue in modern law, as my object has been to place its historical character in a clear light, which the introduction of modern controversy tends to obscure. The facts do not make exclusively for either side of this controversy, which must be determined with a view to the present and the future, not to the past. But let us be careful whichever side we adopt not to distort history.†

Æ. M.

* Eichhorn points out the error of supposing the fine or composition of the feudal law on alienation to be derived from the laudemium of the emphyteusis. *Deutsche Staats und Rechts Geschichte*, iii. 445.—“Eine der allgemeinsten ist sicher die Verpflichtung des Vasallen bei Lebensveränderungen eine Lehenware zu zahlen . . . die man ganz mit Unrecht gewöhnlich aus dem römischen Recht herleitet. . . Die Lehenware ist eine ganz gewöhnliche Præstation der deutschen Hofrechts und Spure solchen Præstationen bei ritterlichen Dienstleuten kommen schon in elften Jahrhundert vor.”

† Since writing the above pages, I have been favoured by Professor Muirhead with the perusal of several valuable continental treatises on emphyteusis. It would carry me too far from the immediate purpose to discuss this subject in greater detail, but I seize the opportunity of bringing them under the notice of students of the civil law, and any who take an interest in the history of European law, which is not the least important phase of European civilisation. They are (1) *Specimen Juridicum Inaugurale de Jure Emphyteutico. Pro gradu Doctoratus*, by Johannes Philippus Valoren. Trajecti ad Rhenum, 1826. (2) *De Originibus et Naturâ Juris Emphyteutici*, by C. F. Alphons Vuy, *Juris utriusque Doctor, Genevensis, Heidelbergensis*, 1838. (3) *Histoire de l'Emphyteuse en Droit Romain et en Droit Français. Mémoire Couronné par la Faculté de Droit de Paris*, par M. E. Pepin le Haleur Docteur en Droit, Avocat à la Cour Royale de Paris, 1843. (4) *Studi Storici Sopra il Contratto D'Emfiteusi*, di Elis Lattes. Torino, 1868. In reading these scholarly monographs, written by a Dutch, a Swiss, a French, and an Italian lawyer, it is impossible not to feel, with shame, the contrast between the state of legal learning in this country and abroad. The first two were written as theses for the degree of Doctor of Law; the third for a prize offered by the Faculty of Law in the University of Paris; and the fourth for a prize given by the Academy of Sciences at Turin. Might not the Faculty of Advocates take a hint, and make the theses they require of intrants of real service to them, as a part of their legal education, instead of the farce they at present are? Might not some of the members of that learned body, who complain of the monopoly of practice, do something in a field in which there can be no monopoly?

THE ABOLITION OF FEUDAL TENURE.

(Continued from last number.)

AFTER explaining the main reforms which they recommended, the Commissioners of 1837 refer to the objection that by holding the superior's concurrence as implied *ipso jure* in every step of transmission, he is deprived of the advantage he now possesses at every successive renewal of the title of an heir or disponent, "not only of enforcing his rights as superior, but of seeing that the new deed of investiture to which he is necessarily a party shall be consistent with his interests as superior, and shall duly express and give effect to the respective rights of the parties." They think, however, that this is no sufficient objection to the great reform which they suggest; for, they say, "while we propose that the title of the heir or disponent shall be held to be complete by the fact of his recording infettment

"In the same manner as if the superior had actually concurred by granting his charter of resignation or confirmation, we should still leave it open to the superior, but to him alone, and so far only as his interest was concerned and not barred by prescription, to challenge and set aside, or reform any title, though completed on the record, which the heir or singular successor, according to the rights of parties, could not now have compelled the superior by remedies of common use to grant.

"This, no doubt, would subject the superior to certain inconvenience, and oblige him to pay more attention than may at present be required of him. We say 'more attention,' because, even as the law now is, he is not perfectly secure in remaining inactive and inattentive to the registers; since many cases may be figured, and occasionally occur, in which important rights may be lost to him by prescription, unless, quitting the state of mere inactivity, he protect himself by the remedy of reduction. In the present condition of his rights, where an estate of superiority is valuable for its untaxed casualties, it is only by attending to the actual state of possession, that the revenues of such an estate can be secured. Prohibitions against sub-feuing, rights of pre-emption, and, generally, all conditions and stipulations which the law does not account *inter essentialia* of the superiority, will be lost to the superior, by the possession of a party during the years of prescription, upon an inconsistent title, though flowing from his vassal. Further, in requiring the superior to give this attention to the records, and to look to the manner in which titles shall be completed by heirs and singular successors, we make the demand against a party, who, if the estate of superiority be really of value, must be aware of the change. Where it is valuable for its annual feu-duties, the superior and vassal must remain in contact, nearly as close, and for the same reason, as landlord and tenant. Should the measures we recommend be adopted for extinguishing feudal casualties, and converting them into feu-duty or annual *reddendo*, the superior will cease in most cases to have interest in the transmission of the estate, but, at all events, will necessarily be aware of any change in the vassal.

"Besides all this, it will be observed, that the right of challenge, which is to remain with the superior, will practically have the effect of forcing the vassal to recur to him, not indeed for the completion of his title as against third parties, but in order to show any intending creditor or purchaser, that the claims of the superior have been satisfied, and that the titles, as actually completed on the record, are not such as the superior, though within the years of prescription, can object to."

In the summary of proposals with which the Commissioners follow

up their leading suggestions, they say, with regard to the superior's remedies:—

“While the vassal, or his heir or disponee, is thus enabled to complete a title without the superior's concurrence, it is necessary to protect the superior in the event of the title being completed contrary to his right or interest, whether by the omission of clauses which ought to have been inserted, or by the insertion of clauses to which he is entitled to object. In many cases this protection would be afforded, and the erroneous sasine competently corrected by the vassal taking infeftment upon a charter of *novodamus*, in such terms as were necessary for the superior's security. Such new infeftment being held thereafter as the regulating title on the record, would furnish a sufficient remedy, and one quite consistent with the general principles of law, where no real securities had been granted, but where the property stood upon the infeftment of the party whose sasine had been erroneously taken, or of his heir or disponee. But a further and more efficient remedy is requisite to meet all cases, and especially cases where the party infeft refused to consent to such new grant, or where, from the creation of intermediate securities, a renewal of the title, as having no retrospective operation, would be an improper and incompetent mode of qualifying the title on which these securities were made, and consequently the securities themselves. The remedy we should recommend, as equally applicable to all cases, is judicial, by action of declarator, or reduction and declarator, setting forth the successive sasines erroneously taken, concluding for their reduction in so far as inconsistent with the superior's right and interest, and for declarator of the terms in which they ought to have been taken, and should be held to have been taken. Such a decree, recorded in the register of sasines, should be held to operate retrospectively as a qualification of the title—precisely in the same manner as a charter of confirmation, in which the superior confirms the sasine, but under all the terms and qualifications which the nature of his right may admit or authorise. We do not consider the insertion of such a decree in the register of sasines as inconsistent with the nature or proper object of that record. When recorded, it would have this advantage over a charter of confirmation, that the record itself would show the qualification of the right just as if the title had been made up by sasine on a charter of resignation. The parties called in such an action should be the parties infeft in the right of property to whose infeftment the superior objects, and the parties appearing upon the record as real creditors should also be called for their interest. If the superior succeeds, he should be entitled to costs, as betwixt agent and client, against the vassal and his heir or disponee infeft, and these costs the Court should have no power to modify. On the other hand, if the superior has improperly brought his action against the vassal, and it shall be found that his title was completed in such a form as the superior had no right to object to, he should obtain decree of *absolvitor* also with costs, as between agent and client, which the Court should have no power to modify.

“Further, it might be expedient to provide, if the vassal before taking his sasine submitted it to the revision of the superior, or the superior's known agent; and if the superior either refused to revise the sasine, or proposed the insertion of clauses which the vassal was entitled to object to, or objected to clauses which the vassal was entitled to have inserted, and in these cases the superior, though he succeeded in obtaining a correction of the title, should not have right to full costs of suit as a matter of course, but the right to costs on either side should be left to the discretion of the Court; as they should also be left to the discretion of the Court where the title could have been conveniently corrected by sasine on a charter of *novodamus*, and the vassal extrajudicially offered to take that course at his own charge. We think some such provision, especially as to full costs, is necessary to protect the right of the superior on the one hand, and on the other to discourage vexatious actions at his instance against the vassal.

“It has further occurred to us, as an additional protection to the superior, that he should be allowed to bring before the Judge Ordinary, as well as the Supreme

Court, an action of exhibition of his vassal's titles at successive intervals, so as to ascertain, from time to time, how these stand, independently of what he may discover by attention to the record; the vassal being bound to exhibit his titles upon oath, and the superior being also entitled to diligence against those possessed of writings in which he has an interest. When the titles are produced, the superior will be able to shape his course, and obtain the remedy, if any, which the case may require. But, in truth, we do not apprehend that there would be much ground for these actions being brought."

We regret that the limits of our space forbid us to quote more largely from this valuable report. The legislators who have innovated on our law of land rights since its date have only adopted what its authors regarded as its least important recommendations, and those which they held the most necessary and most valuable still remain to be carried out. It is, happily for us, only when a plan of law reform becomes venerable for its antiquity that it has in this country a chance of becoming law; and we imagine that, upon this ground, the proposal to abolish compulsory entries and casualties is now entitled to be adopted by the Legislature. We think the question whether that proposal shall be adopted is answered in the affirmative by the unanimous voice of the country, and that the confusion of tongues which has prevailed in the profession has been occasioned entirely by the larger and more doubtful question indicated in the title of the present paper. The suggestion that the feudal tenure and the relation of superior and vassal might be entirely abolished was first thrown out in recent times by the Lord Advocate, then Solicitor-General, in his address to the Scottish Law Amendment Society in Jan., 1869. (See Transactions, p. 11). It was more fully developed in his address to the same society nearly a year later (Nov. 29, 1869, printed in the Journal for January). It was then propounded by Professor Robertson of Glasgow with all his usual ability and learning in an address to a Glasgow society, delivered and published in February last. We were unavoidably prevented at the time from giving this pamphlet the notice which it deserved. It does not appear to differ materially from the Lord Advocate's original bill as to the abolition of the feudal tenure and the transmutation of the superior's estate in the land into a mere real burden. Mr Robertson speaks with complacency of the ground annuals which in all future building conveyances must take the place of feu charters. He says:—

"The difficulty which falls to be considered is, would the superior be as safe under a *quasi*-burgal system as he is under the present feudal system of conveyancing? This brings me to state, and I do so with confidence, that were a tenure substantially the same as burgage tenure established in the case of lands held feu, no superior could say that his rent charge, or whatever other name the annual payment might bear, would be less secure than a feu duty of corresponding amount. In all such cases what is the real test of value—what but the price which the feu duty or the ground annual realizes in the market? Now, it is notorious in practice that, assuming the extent of ground in the one case to be equal to that in the other, a ground annual over burgage property is as highly esteemed, and, consequently, that it brings as high a price in the market, as an ordinary feu duty of the same amount. Than this, I think, nothing could better demon-

strate the futility of the talk which we have had about shaking the security upon which a superior holds his feu duty. If the security is diminished, the market value must necessarily fall; but if the market value is maintained, surely we are warranted in asserting that, whatever else has happened, the security has not been diminished?"

This, we think, is all that Professor Robertson says about the serious difficulty which all must feel who shrink from depriving superiors and their creditors of the smallest of the guarantees by which their property is protected. We should have liked to hear more on the point from so sagacious and experienced a man of business; for, we confess, we are not yet satisfied that any substitute yet proposed for the present title and remedies of the superior will leave him in possession of as valuable an estate as he now has. On the contrary, so far as our present lights go, we are inclined to concur with the report of the Writers to the Signet, who say:—

"The maintenance of the *Declarator of Irritancy* is in many cases essential to the preservation of the superior's estate. Feu-duties are not unfrequently very small sums, a few shillings or even pence each, very many in number, but yielding in the aggregate a very considerable revenue. Such feu-duties are, notwithstanding, collected without any arrear, owing mainly to the existence of the right of forfeiture of the vassal's estate by which they are at present secured. If that security be withdrawn, a vast number of feu-duties will be so difficult of collection as to be comparatively of no value. The making feu-duties, as this Bill proposes, a real burden on the lands, is no antidote for this evil. Each feu-duty must be separately recovered, and the raising an ordinary action, or pursuing an action of mails and duties, for the recovery of sums which separately are so insignificant, would cost so much time, trouble, and expense—would be so onerous, compared with the end to be attained, as to be practically useless. The value and efficiency of the remedy, by irritancy or forfeiture, is perhaps best evidenced by the unquestionable fact that, at this moment, feu-duties are of all others the very best securities in the market, though an action of irritancy is very rarely resorted to, and almost never carried to its conclusion, the mere threat of having recourse to it being generally sufficient to produce payment where any difficulty occurs.

"*Real burden* is not, in any case, the efficient and marketable security which seems to be assumed in this Bill. This is well shown by the marked difference which formerly existed between feu-duties and ground annuals as marketable securities. While feu-duties have always attracted money at the lowest rate of interest accepted on best landed securities, the owners of ground annuals, where simply a real burden, could never obtain loans except at a much higher rate, and sometimes had difficulty in procuring them at all. This, as is well known to the profession, gave rise to the creation in Glasgow, where rights of ground-annual are frequent, of a new form of deed, by which, in constituting ground-annuals, not only are they created real burdens, but bond is granted for payment of them, and the lands disposed in security of the personal obligation. That such deeds were found necessary in order to render such securities marketable, shows clearly the great injustice that would be done to superiors by reducing their feu-duties to the level of a mere real burden. The effect of this measure would be to deprive superiors of the very best real security that exists, and to provide them in lieu of it with the very worst."

We should like to have it explained whether ground annuals being a much longer deed, would not, besides being less safe, be considerably more expensive than the feu-charter. It has been said that the declarator of irritancy is a barbarous and absurd remedy, which cannot be tolerated in an age of civilization. But conventional irritances are

not prohibited; and a man who purchases a feu takes it subject to the irritancy just as much with his eyes open as if he had signed a lease containing an irritancy as one of its conditions. The climax of absurdity is reached by those who say that the superior may fairly be deprived of his declarator of irritancy, because, as a real creditor, he will be equally safe with a poinding of the ground. But is not that a still more barbarous remedy which operates not against the debtor but the debtor's tenant, between whom and the creditor there never was any privity?

We have not yet had the benefit of any argument in favour of the view that superiorities should cease as separate estates in land, and that the person having the beneficial use of land should have an unlimited and indefeasible title to it. There may be some advantage in point of symmetry and uniformity; but we have heard nothing as yet of any disadvantages of the present system, which will not be removed by the two principal, and still unrealized, recommendations of the Commissioners of 1837, and we do not know advantages of an allodial or *quasi-burgal* system which cannot be secured under the amended feudal system—unless, indeed, it be that conveyances will be ten times as long and law suits ten times as numerous as they are now. That this will be so we can easily imagine, but wherein the advantage to the community consists we do not know. So far as uniformity and symmetry are concerned, the observation of Montesquieu is to be kept in mind:—
 “Il y a de certaines idées d'uniformité, qui saisissent quelquefois les grands esprits (car elles ont touché Charlemagne,) mais qui frappent infailliblement les petits. Ils y trouvent un genre de perfection qu'ils reconnaissent, parcequ'il est impossible de ne le pas découvrir; les mêmes poids dans la police, les mêmes mesures dans la commerce, les mêmes loix dans l'Etat, la même religion dans toutes ses parties. Mais cela est-il toujours à propos sans exception. Le mal de changer est-il toujours moins grand que la mal de souffrir?”

Until the amended bill which is understood to be in preparation is seen and considered, and until some of the very few eminent persons* who favour the entire abolition of the feudal tenure have given us some reasons in support of their view—which, no doubt, they will do—we do not mean to give any decided judgment on the issue before us; but it must be admitted that at present the weight of authority and argument is in favour of retaining the tenure, with amendments. The Lord Advocate will earn a sufficient title to the gratitude of his country if he accomplishes the reforms which the Commissioners of 1837 most earnestly recommended, but which no Lord Advocate has hitherto had courage to attempt.†

* The authority of the greatest of recent feudalists, Lord Curriehill, was cited by the Lord Advocate in his address in November last in support of the project for abolishing the feudal relation. The Lord Advocate was probably speaking from memory of Lord Curriehill's paper before the Social Science Congress in 1863; but, in fact, that paper advocates only the abolition of entries and commutation of casualties, —not the destruction of rights of superiority as estates in land.

† We have received the amended Bill too late for notice, and find that, while somehow retaining the superior's estate, it still abolishes the relation of superior and vassal.

Reviews.

The Law Magazine and Law Review, a Quarterly Journal of Jurisprudence, Nos. LVI. and LVII. February and May, 1870. London: Butterworths, 7 Fleet Street.

IN the February number of this valuable periodical, the first article is on Life Assurance, and enforces the proposition that life assurance is not a trade, but a trust, and that the ideally perfect system is one in which the State should be the insurer, when "it would be thought as absurd to set up a new speculative assurance office as it now is to establish a new voluntary savings bank." The writer, however, supports the principle of Mr Cave's Bill as being necessary so long as assurance companies continue to exist. Another paper discusses the important question whether a political war and a commercial peace are inconsistent, without arriving at any very clear conclusion. *The Land Question* is a long paper consisting mostly of marshalled quotations from journals, speeches, and pamphlets, and pointing out the bearing of the question on English land. The Charters of the City of London form the subject of a semi-antiquarian, semi-political article. Mr F. M. Wetherfield sketches lightly and clearly the changes introduced by the new Bankruptcy Act. Articles follow on Slander, the Law of Limitation, the Works of George Coode, and on Mr Archibald Young's most interesting and unpretending work on "The French Bar."

The May number begins with a detailed criticism, by Mr T. L. Murray Browne, of the civil code of New York. The critic arrives at this "deliberate opinion:—

"The civil code of New York is in a high degree meagre, ambiguous, and inaccurate. It has not yet received the sanction of the Legislature. Should it ever do so, it may be useful to students as an elementary text-book. It may also be of service to laymen desiring to obtain some notion of the general principles of the law. To the practitioner it will, except so far as it affects alterations on the existing law, be absolutely useless. So far as it alters the existing law, it will, from its meagreness and imperfections, be productive of extensive litigation, and will require to be wrought into shape by a vast amount of judicial interpretation."

"The Law Military, as distinct from Martial Law," is a longish paper *apropos* of Mr C. M. Clode's recent work on "The Military Forces of the Crown; their Administration and Government." It is followed by a very interesting paper on the recently published Diary of Henry Crabb Robinson. The most interesting and important part of the number is an authentic report of Mr W. Beach Lawrence's speech on the marriage laws of various countries as affecting the property of married women, delivered in the discussion at the Social Science Congress at Bristol in October last.

Brief Summary of the Law of Intestate Succession in Scotland: Embracing Tables shewing Distribution of Intestate Succession in Moveables and Descent in Heritage, with an Appendix containing Relative Enactments, Forms of Inventories, and Succession Duty Tables. By P. H. Cameron, Scotch Law and Parliamentary Agent, London. Edinburgh: Bell & Bradfute.

THIS manual will be handy for lawyers. It is also intended for the general public; but we do not think it consistent with our duty to recommend the public to depend on any law book for information which can be got much more safely from a legal practitioner. In the office, however, it will often save much time to refer to Mr Cameron's carefully constructed tables, the remarks appended to which furnish references to passages in books where fuller information can be got when required.

The Month.

The Scotsman's and Sir W. Gibson-Craig's Reflections upon Lord Advocates.—We are sorry to return to a subject to which our own paragraph last month and an injudicious defence of the Baronet in the *Scotsman* of June 2d, have already given greater importance than it deserves. We have, however, to express our satisfaction with two things in the article in the *Scotsman*, and to point out a third which grievously requires explanation. In the first place, it is refreshing to see the rare spectacle of a Whig standing by his friends through right and wrong, and evidently against his conscience. We set little store by the friendship which holds good only so long as its object is immaculate. That friendship is of a much higher order, which, like the *Scotsman*, rushes to pull its friend out of the mire, although in doing so it defiles its own inexpressibles and bespatters the object of its love with additional filth. Again, we are pleased to find that the *Scotsman* cannot avoid betraying his substantial concurrence with our view of the matter. He attempts no defence of Sir W. Gibson-Craig's speech on its merits, but insinuates a doubt whether it was "needed or superfluous." He is angry, but his anger is excited rather by the folly of the friend he is bound to protect, than by the conduct of the ruffian who has assailed him. He can find no defence more pertinent than abuse of that assailant, and, unlike the *Scotsman*, no abuse more effective than angry epithets, which were originally, and privately, no doubt, levelled at the other party concerned in the controversy, but are directed by decency and consistency against ourselves. We, however, can afford to be patient, and we resent the misapplication of the terms only so far as to wish that the writer in the *Scotsman* could be condemned to re-peruse his own article, calmly if possible, over his morning pipe. We think he would then find

that, if not "untruthful, stupid, and ill-tempered" himself, he showed at least unbounded confidence in the stupidity of the public when he asserted that the Lord Clerk Register, in the speech quoted in our last number, drew a comparison "not between these last three or four months and all preceding time, but between the last twenty or twenty-five years and the days before that!" There we leave our candid critic, only asking him to explain how, if this be so, his afflicted friend possessed his soul in patience during all this quarter of a century until the 30th of April, 1870? and whether, after this praiseworthy self-mortification, this painful, protracted, and uncomplaining abstinence from bills, it was owing to some hysterical affection or to some aggravation from without, that his virtue then broke down?

Delay in the Court of Session, and the Distribution of Business at the Bar.—A writer in the *Scotsman* has called attention to the state of Outer House business, which he describes as being simply a muddle. His statements have excited much attention in legal circles, more on account of their truth and their entire coincidence with views less forcibly and less publicly stated in the every-day conversations of Edinburgh lawyers, than on account of their novelty. The writer, who avows himself to be an agent, has laid bare what is, in fact, the great cause of useless expense and delay in the Court of Session, and, therefore, one of the main causes of its unpopularity. We shall let him speak for himself. He calculates that, apart from proofs and motions, seventy-two cases are always put out for hearing in the Divisions and Outer House. These, he says—

"May be all called on the same day; but as counsel cannot be got, the cases are continued from day to day, the result being that those which were put out for the 12th May are not yet overtaken, and some of them not likely to be overtaken, by the time the Court rises on 20th July. The question which naturally presents itself is, how does this come about? The answer, which could be given by the youngest Parliament House clerk, is, that, although the cases are put out, it is not seriously intended that they should—and, indeed, it is impossible that they could—be all overtaken. Then, why put out so many cases at once? The answer given to that is, that, as there are four junior counsel who are in the great majority of these cases, the cases must be continued from day to day, and from month to month, until some of these four counsel happen to be disengaged when the cases are called. The result of this is that, as appears from the rolls, more than one case which was put out in the debate roll for hearing in October were not heard when the Court rose in March. At present there is nothing to prevent, indeed, it is a common occurrence for a counsel to be in the great majority of the above seventy-two cases, and it is no exaggeration to say that by the time a particular case comes on for debate, he has, if not entirely forgot what the case is about, at least no sufficient recollection of the facts to enable him to debate it. The rolls of cases are thus put out to accommodate the four counsel referred to, and a few others who may be more or less employed, and the question simply comes to be—Are the interests of counsel or the interests of the litigants to be paramount?

"The remedy is very simple; but I should say that the blame does not rest either with the Judges or the counsel referred to—it rests very much with the agents, who, when a man of some standing employs a particular counsel, run after him like a flock of sheep. No doubt, it may be said the agents should act otherwise; and so they should; but their doing wrong is no answer to the litigants

and the public, and the remedy must be applied irrespective of such considerations. It is simply this: Let the Judges put out for a particular day only the case or cases which they intend to be debated, and as the Judges are, by the time a debate comes on, intimately acquainted with the cases, they should have a pretty good notion of how long a debate is likely to last. At present, a Lord Ordinary calls over and over again, day after day, his whole roll. In No. 1, counsel is engaged at another bar. In No. 2, counsel is before another Lord Ordinary just going to speak. In No. 3, counsel is speaking in the First Division. In No. 4, in the Second. In No. 5, counsel is listening to an opponent in one of the Divisions, and is about to reply; and when No. 6 is called, the counsel, not expecting the case to come on, and never having read a word of his papers, either keeps out of the way or gives some frivolous excuse for delay. And even when counsel are got, I take leave to say that there is scarcely ever a debate begun and finished in the same day, the counsel being interrupted and taken to the Inner House or a proof. This all arises—first, from the great number of cases put out for hearing at the same time, and from the fact that there are four junior counsel at the bar, one or other of whom is in almost every case. The consequence is that the Outer House is simply in a muddle.

"According to the mode of procedure which I suggest, a Lord Ordinary would put out a case for a particular day, say, at least, three days before the day of hearing, and I undertake to say that there will be no difficulty whatever in finding a counsel to plead the case, and plead it well, for I am satisfied that there are many men of the junior bar who, with a little experience, would be equal to the favourites, able and worthy though these gentlemen be. This system would also lead counsel to consider what never enters their minds at present—viz., whether their other engagements would admit of their undertaking a particular case. I don't blame counsel for this. It is the system."

"The only objection to the course which I propose is that it will diminish very much the incomes of the favourite counsel; and the public will judge whether that is a sufficient answer. It is no doubt true in point of fact, while it is also true that the incomes of counsel generally will be increased. It appears to me, however, that the question is not whether the incomes of particular counsel will be increased or diminished, but what is most for the benefit of the litigants and the community generally."

It is not within our province to interfere with the distribution of business among the members of the bar, so long as the interests of the community, and of the profession in general, are not seriously affected by a vicious system; nor would it be desirable that this journal should have commenced a discussion on so delicate a subject. But now that one, to whom no sinister motives can be imputed, has opened the debate, and has pointed out that a real injury is being done, by the existing monopoly, to the public, the profession, and the law, we are no longer at liberty to keep silence. But we must say, at once and emphatically, that in no degree do we impute moral blame to the gentlemen who have obtained—by no fault of their own, indeed not without much merit—the pre-eminence referred to. If we have errors on their part to complain of, we shall do so frankly and without reserve, but we wish to do so with the courtesy and respect which their talents and character require. We are to be understood, moreover, as expressing, not merely an individual opinion, but the views which are entertained and freely expressed on this subject by a very large number of the members of the bar, as well as by many intelligent members of the other branch of the profession.

At first we were slow to believe the assertion that four junior counsel are in the great majority of cases in the Court of Session; but on examining the Debate and Procedure Rolls and Inner House Rolls for one week, we find it to be quite true that the names of four junior counsel do occur with remarkable iteration. Somewhat above forty other gentlemen appear to have a sprinkling of business; perhaps six or seven of these have from a sixth to a third of the amount of business enjoyed by the four favourites. Two of the latter, it is to be observed, add a large senior practice to that which we are now considering, and all of them are in many other cases in which their names are not mentioned. It is plain, therefore, that the results stated in the *Scotsman* must be of no uncommon occurrence. Indeed, no one can have had any experience in the Court without being acquainted with many cases which have been hung up in a dead-alive state in the Outer House for three, six, or even twelve months, simply because an advocate in large practice could not be got to attend—nay, of debates actually begun and for the same reason not concluded for many months.* It might be invidious to assert that debates so protracted and disjointed are not conducive to the satisfactory decision of cases; but no one will doubt that the delay thus occasioned is most irritating not merely to the litigants immediately concerned, but to all those who have been labouring for years to accelerate the pace of causes in the Court and restore it to the favour of the country. Mr Gordon's Act has but lately compelled agents to move on by forbidding prorogations of the terms for lodging pleadings; but instead of effecting a cure, that change has only shown that delays in the debate roll are as mischievous as those which formerly occurred in the preparation of the record.

It is in the taking of proofs that the existing system is most distinctly and directly prejudicial to clients. An Edinburgh agent is instructed by a country correspondent to retain two counsel, both in large business, to conduct an important proof. He does so, perhaps against his own judgment. The result is, that each of these counsel, amidst the multitude of his other engagements, trusts to the other to manage the case, and neither of them has carefully read his papers; they are occupied, while the proof proceeds, at other bars during alternate half hours, and neither of them at the end of the day is duly acquainted with the evidence, or even with the precognitions. This, which happened the other day, happens often; and, unfortunately, it is but rarely that either agents openly resent it. That such a thing should occur in the taking of proof, where only a consummate senior can be

* The fact is too notorious to require support from any evidence; but out of many other cases to which we could refer, we shall mention two not at all uncommon in their circumstances: one in which a debate begun early in June, 1869, was not finished till late in the November following, on account of the repeated absence at the calling of a member of the quartet; and another sent to the Summary Debate Roll on February 1st, in which counsel on one side has attended four times during this session alone, but in which, for the same reason, no progress has been made. It may be added that some Lords Ordinary sit before an empty bar for hours every week, meekly waiting for counsel who never appear.

of service at all without close and constant attendance, is enough to condemn the present system. Even a counsel who has thoroughly mastered his precognitions is not perfectly qualified to examine a witness, still less to cross-examine, unless he has heard all the material witnesses who have gone before. We are as far as possible from disparaging the talents, skill, or industry of gentlemen who are placed by their admirers in too trying a position; but there is a limit to the greatest human powers. Talents and skill are not the only qualities required of counsel; the most untiring industry may be overtasked; and, above all, it has not been given to any man to be in two places at once. It is a lesson which a certain class of agents is very slow to learn, that, in nine cases out of ten, attention, diligence, and sound learning are infinitely more valuable than showy talents and fluent rhetoric, especially when the latter qualities are distributed over many cases in infinitesimal quantities. It would be wholesome for agents and clients if they could overhear, in the law-room or at the fireside, when a case is called for the tenth time, and can no longer be shirked, the too frequent boast—for the tone has more of boasting than compunction—"Confound it; I must go up to Lord Formidable in *Peebles v. Peebles*, and I have never opened the string of my papers."

It is impossible to trace all the causes to which the Outer House muddle, and the monopoly of business, are due. We decidedly refuse to believe that one of these causes is to be found in any improper combination among the gentlemen who have become popular favourites. It is whispered that some flourishing counsel, when asked now and then to suggest a senior or a junior to act along with themselves in a particular case, are fond of prompting the selection of a brother in large practice, who may be able and willing to return the favour. In so small a body as the Scotch bar it is plain that this reciprocity dodge could be worked with great effect, that it might almost succeed in securing a close monopoly. But it is well known that with our foremost seniors it is now, though it probably was not a generation ago, a settled maxim not to suggest a junior; and we believe that many juniors adopt the same rule. Such a rule indeed is necessary to men who would avoid a responsibility which rests upon the agent alone, and who have a proper sense of the duty an advocate owes to himself and to the body of which he is a member. We entirely discredit the fable that any such combination or understanding or reciprocity exists, between any respectable members of the bar.

It is frequently said that the rush upon favourites, and the obstruction thereby occasioned, is due to the ignorant enthusiasm of country agents and clients, anxious to have their cases conducted by men of great names. This is not strictly correct, for there are town agents with the same proclivities. But among both classes there is often a timid shrinking from personal responsibility, which leads to the selection of a man whose reputation is great enough to excuse the agent from blame in the event of defeat. Unless there be special reasons of friendship or interest—and how widely and powerfully such influences operate

every one knows—it may be predicated generally that the weaker class of agents resort to the most popular counsel, while those who are strong enough and intelligent enough to understand their cases and to estimate the qualifications of counsel, pick out men who have time and special fitness for the particular case, rather than those whose position might save their own credit, but who would be far more costly to their clients in time, anxiety, and money.

The necessity of the remedy suggested by the writer we have quoted can hardly be questioned. There is reason to believe that the provisions of the Act of Sederunt of July, 1865, are at present evaded or forgotten. Probably a considerable improvement might be effected if they were rigidly enforced; but a firmer purpose to enforce them is required, both in the Judges and in the bar. A morbid delicacy exists at the bar about moving for decree by default under sec. 2; while we suspect little delicacy exists among clerks in making false or doubtful excuses for absence. Two or three decrees by default under sec. 2 would go further to cure the existing evils than any other remedy that is now applicable; and the bar, in refraining from moving for such decrees, is not merely careless of the interests of its clients, but of its own honour. An amiable consideration for the convenience or feelings of a brother advocate—even of one who may some day be a Lord Advocate—is no excuse for subjecting a client to a harassing and useless delay, and encouraging a practice which, more than any other—except that of taking fees for work which is not performed—discredits the profession and the Court in the eyes of the public. The writer on whom we are commenting proposes, however, a more effectual remedy, namely—that the Outer House Rolls should be called peremptorily. We can see no reason why this should not be done. A slight relaxation in the order of calling cases would probably be allowed under any system in the Outer House; but it is quite preposterous to require or permit each Lord Ordinary to put out thirty-two cases, any or all of which may be called on any day of the week. The system can serve no purpose except one, which it is unnecessary to mention at present, but which may well form the subject of serious consideration in future papers. We propose hereafter to consider the evil effects of the existing system on the character and position of the bar, and other topics naturally suggested by it.

The Privilege of the Judicial Office.—The affirmance of the case of *Watt v. Thomson* in the House of Lords is only what must have been expected by all; the judgment being entirely in conformity with the principles of *Hamilton v. Anderson*, 3 Macq. 363, and *Mackintosh v. Arkley*, 6 Macph., H.L. 141. The case is reported at some length below. It would have been quite unreasonable to hold that the Sheriff-Substitute was not doing a judicial act in refusing the interim interdict and requiring the petition to be left that his judgment might be written on it; and it could make no real difference that he had suggested to the Sheriff-Clerk that an application should be made for

a process caption when the petitioner's agent carried it away. The Sheriff-Clerk is an independent officer, and not in any sense the servant of the Sheriff, and he was bound to exercise his own discretion in judging whether or not he should make such an application. Having made it, he is not protected by the privilege of the judicial office, but is bound to answer like any other litigant. The case will be referred to in future as an illustration of the now familiar doctrine that a Judge cannot be made civilly liable for any act which was done, or which he honestly and reasonably believed to be done, in the discharge of his judicial duty. This privilege is conferred on Judges in the interest of the public; because, "in the imperfection of human nature, it is better that an individual should occasionally suffer a wrong than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it" (Per Lord Tenterden, in *Garnett v. Ferrand*, 6 B. & C. 611). It must be satisfactory to the defender in this appeal that the Law Lords have not, as in some previous cases where the same privilege has been sustained, animadverted on his conduct as being high-handed or a straining of his powers. On the contrary, the whole tenor of the judgments leads to the conclusion that he could not have done less in vindication of the dignity of the Court. The Lord Chancellor distinctly expresses his opinion that the pursuer's conduct in walking away with the petition "was unjustifiable;" and if that be so, he concludes that "the offence the Judge takes at such conduct was a very just offence, and was simply such offence as every Judge in the discharge of his duty to the public ought to take as an irregularity committed in the face of the Court."

Obituary.—ARCHIBALD M'NEILL, Esq., W.S. (1829), one of the Principal Clerks of Session, died at Edinburgh, June 2d. Mr M'Neill was the fifth son of the late John M'Neill, Esq., of Colonsay and was born at Colonsay, Sept., 1803. He was a brother of Lord Colonsay and Sir John M'Neill, G.C.B. In 1843 he was appointed Director and Principal Clerk at the Chancery Office, succeeding in that post Mr R. Aytoun. He remained at the Chancery Office till 1858, when, exchanging with Mr John M. Lindsay, he became one of the Principal Clerks of Session, and in that capacity he has since officiated at the table of the First Division. During the last year or two of his life the state of Mr M'Neill's health caused anxiety to his friends, and some weeks before his death the symptoms became more serious, but a short residence in the country and relief from all business greatly revived him. He appeared to be much better, and returned to town for the purpose of resuming his official duties in the Court, but a sudden attack of illness on the evening of the 2d of June carried him off. Mr Archibald M'Neill possessed good natural abilities, and much of that native shrewdness and good sense which characterises so many of his countrymen. He had a high sense of honour and a warm and genial nature which endeared him to his friends. In early life he took a keen interest in politics, and warmly supported the Tory party.

It was in his nature to throw himself heart and soul into any cause he embraced; but his downright honesty of character and his frank and generous disposition were so much appreciated even by his opponents that it may with truth be said that he did not make an enemy by it, and ranked many of the opposite party among his warmest friends. He was fond of country life and agricultural pursuits, and passionately attached to his native island. He was also a keen sportsman, and probably his happiest moments were when he was coursing deer on the hills of Jura, or coasting the islands in a boat with a crew of Highlanders, with whom he conversed freely in Gaelic, thoroughly enjoying their peculiarities. His interest in the celebrated breed of deer-hounds possessed by his family, and which he had been mainly instrumental in preserving pure and of high quality, led him to contribute a curious and interesting account of these dogs to the work published by the late Mr Scrope on deer-stalking. He took a lively interest in the history and antiquities of his native county, and when the publication of the Dean of Lismore's book in 1862 revived to some extent the Ossianic controversy, he turned his attention to it, and in 1868 privately printed an essay on the authenticity of Ossian's poems, which has been pronounced by all who read it an able and clear digest of the arguments in its favour. Mr M'Neill had a large circle of friends, many of whom were warmly attached to him, and his loss will long be felt by all who knew and appreciated him. The writer of this notice was for upwards of 35 years on terms of intimate friendship with Mr M'Neill, based on feelings of mutual esteem and regard which were never clouded for a moment, and it has been a loving task to him to record the sterling qualities which characterised the friend he has lost.

ALEX. MONCRIEFF, Esq., Advocate (1852), Sheriff of Ross and Cromarty, died at Edinburgh, June 2d. We remember scarcely any event which has produced so profound a gloom, so deep a feeling of personal loss throughout the legal profession in Edinburgh. There were men among his contemporaries who held a more prominent position in the eyes of the public, who were marked out for more extensive employment, and perhaps for earlier promotion; but there were none who excelled him in legal acumen, persuasiveness of language, or in a rare and lofty sense of professional honour. *Multis ille bonis flebilis occidit*; and we can say no more than has already been well said in the *Scotsman*.—

"Mr Moncrieff was the eldest son of the late Hugh Moncrieff, long known and respected in Glasgow as the head of one of the chief legal firms in that city. He was educated at Glasgow College, where he gained high distinction in several branches of study. He was appointed Advocate-Depute in 1862, and discharged the duties of that office with remarkable ability and success. In 1869 he succeeded Mr Cook as Sheriff of Ross and Cromarty—an appointment which received the universal approval of his brethren at the bar. To the duties of this new office, including the labours of the Board of Supervision, he devoted himself from the first with the greatest zeal and assiduity. . . . Mr Moncrieff was a powerful and singularly persuasive speaker; had a good legal head, acute,

subtle, and ready. His health, which was never robust, must have made the constant application necessary to win a leading position at the bar very arduous to him; but there can be no doubt that, had he lived, he would have attained, and deserved, the highest honours of the profession. His political opinions were those of a steady and consistent Liberal, and latterly he had begun to take a promising part in public matters, particularly the education question, in which he felt a deep interest. He had a keen and unaffected love of literature and literary society; his taste was good, his appreciation just; and there ran through his mind a vein of rich yet delicate humour, which gave to his conversation a peculiar charm. Of the qualities which endeared him to so many friends it is less easy to speak here. His death, which was very sudden, threw a marked gloom yesterday over the whole Parliament House; and it will be felt far beyond professional circles; for it is not too much to say that he was loved and esteemed by all who knew him. His nature was, in an unusual degree, pure, truthful, and generous, and, throughout life, unsoiled by the world. He, if ever any man, had kept 'the whiteness of his soul.' Forgetfulness in this world comes fast; but there are very many who will long hold in affectionate remembrance Mr Moncrieff's rare beauty of disposition, and sincere and unpretending goodness."

ACT OF SEDERUNT ANENT SPECIAL CASES.

EDINBURGH, 9th June, 1870.

WHEREAS, by the Sixty-third Section of the Court of Session (Scotland) Act, 1868, it is provided that, "When a Special Case is laid before one of the Divisions, the Court may order such Documents as appear to be necessary to be printed and boxed, and shall hear Parties in the Summar Roll;" And whereas, by the One hundred and sixth Section of the said Act, it is provided that the Court of Session may make Regulations by Act of Sederunt, "so far as may be found expedient, for altering the course of proceeding hereinbefore prescribed, in respect to the matters to which the said Act relates, or any of them;" And whereas it has been found inconvenient and unjust to many Suitors before the Court, that all such Special Cases should have the priority or preference of being heard in the Summar Roll:—

The Lords Enact and Declare, that hereafter the Parties to any Special Case shall have no right to be heard in the Summar Roll; but shall, unless otherwise directed, be heard only in the ordinary course of the Rolls of the Division to which the Special Case is presented.

And the Lords APPOINT this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

(Signed) JOHN INGLIS, *I.P.D.*

Notes of Cases.

COURT OF SESSION.

FIRST DIVISION.

SIMLA BANK CORPORATION v. HOME.—May 21.

Process—Mandatory.—Action against an officer in Her Majesty's forces in India, as cautioner in a bond granted to the bank. Captain Home was in Scotland, his native country, when the action was raised, but returned to India in Dec., 1869. The L. O. (Mackenzie), on March 19, when the parties were in the course of adjusting interrogatories for a proof to be taken in India, on the motion of pursuer appointed defr. to sist a mandatory. Defr. reclaimed.

Lord DEAS—The general rule was that a pursuer going abroad must almost always find a mandatory when so required, unless he show good cause to the contrary. In the case of a defender it was different, and the pursuer asking a mandatory to be sisted, must generally show cause for it—that is, the discretion of the Court is larger in the case of a defr. than of a pursuer. It was a question of circumstances, and the pursuer had stated nothing peculiar. He had not stated a sufficient cause for sisting a mandatory where the debt had been contracted in India; both the parties were now there, and the defender was only a cautioner. It had not been explained why the action was brought against the defender alone, and during his temporary residence in Scotland, the debt having been due long before he left India. Hence, the motion should be refused *in hoc statu*.

Lord ARDMILLAN concurred.

Lord KINLOCH differed, holding that the general rule was that a mandatory should be sisted, and that no distinction existed between the case of a pursuer and a defender in such a question. That distinction was applicable only to the case of a bankrupt litigant called on to find caution.

The Lord PRESIDENT concurred with the majority.

Interlocutor reversed, and motion refused *in hoc statu*.

Act.—Marshall. *Agents*—Russell & Nicholson, C.S.—*Alt.*—J. M. Gibson. *Agent*—J. Home, W.S.

HARDIE v. AUSTIN & M'ASLAN.—May 25.

Sale—Mercantile Law Amt. Act—Seed.—Mr Hardie, seed merchant, Haddington, brought this action in the Sheriff Court of Glasgow for the price of turnip seed of crop 1866, sold by him (by sample) to defra, nursery and seedsmen, Glasgow. Pursuer, in selling the seed, stated that it was grown in East-Lothian, and was "first-class stock." It was delivered on 1st June. On 13th August, defrs. wrote complaining "at the result in growth of the Swedish turnip seed had of you, and which we could not entertain until we had given it repeated trials in our nurseries. The returns show only 50 per cent., with fully 8 per cent. of that low growth weak. Having purchased the seed from you of crop 1866, and net seed, we concluded there must have been some error in our proof, but find them as stated." They therefore refused to retain the seed. The pursuer in reply (August 14)

refused to take it back, observing, "You got the seed according to order, without my giving or your asking any warranty; and until now no objection of any kind was stated." A proof was led, and the S. S. (Galbraith) assaillied, finding it proved that the seed was far from being of first-class quality; but, on the contrary, was such that the defenders could not use it in their business; that the defenders were entitled to rely on the representations, and that they were not too late in objecting to the seed. The Sheriff (Bell) found substantially that the germinating power of the seed ought to have been 90 per cent., while it was only from 60 to 65 per cent.; that the assurance that it was first-class stock implied that it was first-class quality; that, at all events, the contract required the pursuer to supply goods of a merchantable description, which the seed in question was not; that it was not properly a sale by sample, as the seed could not be judged of merely by looking at the sample; and that no undue delay in testing the seed had taken place; and therefore adhered.

The pursuer appealed.

The Court unanimously altered the Sheriff's judgment, and held pursuer entitled to recover the price of the seeds. The only warranty given was that the seed was of first-class stock; and it was proved where the seed was grown, and that it was of the character so represented. It was delivered on June 1, and no objection was made till August 13. The pursuer's letter, in which he said, without contradiction at the time, that no warranty had been asked or given, was almost conclusive. The tests were not very conclusive, the great variety of results obtained by different persons in springing the seed, though generally unfavourable to the seed, showing that there must have been material differences in the mode of testing the seed, which led the Court not to place perfect reliance on the tests. There was no evidence how the seed had turned out in its natural growth, which would have been more valuable. The law was settled by the Mercantile Law Amendment Act, section 5, the effect of which was to throw the risk of the quality of articles sold upon the buyer instead of the seller, wherever there was no knowledge of insufficiency or bad quality on the part of the seller, unless there were either an express warranty, or the article in question had been sold for an express purpose. The last exception had no application in this case, the seed having been sold as turnip seed, simply of a first-class stock, which it was proved to have been. It was sold for the purpose for which all turnip seed is sold, and it could not be held that there was any warranty of its germinating power, and therefore it was just one of the cases in which all the risk lies on the buyer. The Court, therefore, altered and decided in favour of pursuer.

Act.—Black, Campbell. *Agent*—K. Morison, S.S.C.—*Alt.*—Shand, Balfour. *Agents*—J. W. & J. Mackenzie, W.S.

HARDIE v. SMITH & SIMONS.—May 25.

Sale of Seed—*Mercantile Law Am. Act.*—Action by same pursuer against Smith & Simons, seed merchants, Glasgow, for the price of turnip seed sold under somewhat similar circumstances. On May 22, 1870, defra. wrote:—"We have your favour of 21st inst., offering 50 bush. East-Lothian purple-top Swede turnip seed, crop 1866, at 22s. 6d. per bushel, cash in one month. Please say whether you know this seed to be of really first-class stock and good growth. Perhaps you

may be able to state the per centage of germination." Pursuer replied on May 23:—"The seed is first-class stock, the same stock having been grown regularly by father and son for the last 30 years. It is good growth—having been tried in earth about one month since, it grew 90 per cent. 150 bushels of the same seed was sold about two months ago and had no fault. It has been cleansed since, and will likely grow the same. In short, you may have all confidence in the seed." The S. S. (Galbraith) found that the seed was not of good growth, that the representation in the letter amounted to a warranty and was not merely descriptive, and assolized the defenders. The Sheriff (Bell) adhered. The pursuer appealed. The Court unanimously held that the Sheriffs were wrong. The representations in Mr Hardie's letter did not amount to a warranty, but were only a statement of what the seller himself had done, and his inference from his trial. The truth of that statement he was bound to make good; but there was no warranty and no knowledge on the part of the pursuer that the seed was insufficient. The Court therefore reversed, and decided in favour of the pursuer.

ABBOTT v. MITCHELL (WEIR'S TRUSTEE).—May 25.

Lease—Property—Security—Absolute Disposition with bank letter—Bankruptcy.—Declarator of the validity of a lease of a spirit shop in Glasgow, dated 19th March, 1867, and granted to the pursuer, Wm. Abbott, jun., by his father, Wm. Abbott, sen. The endurance of the lease was ten years, and the rent £75. Proof was led in support of allegations of fraud, under the Act 1621, and at common law; but in the course of the debate these were abandoned. The only question remaining arose under the third plea for the defra.—viz., that the lease was not granted by the proprietor of the subjects, or any one entitled to grant such a lease. Abbott senior was proprietor of a considerable extent of house property in London Street, Glasgow, in 1861. He then borrowed some money, granting in security an absolute disposition, qualified by a back bond. This disposition came in 1862 to be held by Weir Brothers & Co.; and in 1865, to William Weir, John Weir, and Patrick Weir, as trustees for William Weir Brothers & Co. The back-bond in 1865, which showed the transaction to be truly in security of £844 advanced by Weir Brothers to enable Abbott senior to settle with his creditors in a previous bankruptcy, and which was not recorded, contained a declaration that, if Abbott failed to pay within three months after a written demand, the trustees, without any further intimation or process, should have the full property of the subjects in the disposition and right to possession. Abbott did not cease to possess the subjects. In February and March, 1867, he advertised the spirit business, goodwill, and fittings for sale, and offers were received. On March 15, his son, the pursuer, made an offer of £400 and £75 a year of rent, which was accepted, and the lease was granted and the money paid. Abbott, sen., became bankrupt on May 20, 1867, and Weir Brothers on April 3. The trustees was confirmed on April 17.

The question of law in these circumstances was whether the lease was good. The Court observed that the question might have been different had Abbott sold the property or granted an heritable security. As between Weir Brothers on the one hand, and Abbott senior and his lessee on the other hand, if all had been solvent there could be no doubt of the validity of the lease. With regard to the claim asserted on behalf of the trustee, it would be a

very strong thing to say that he would be entitled to set aside the lease. Leases were good against a singular successor or adjudger; and there was no reason why a lease, fairly granted in the ordinary course of administration, should not be good against a trustee in bankruptcy too. The authorities cited as to the effect of a trustee's confirmation touched questions which might have arisen if there had been a disposition, but the authorities cited had no application here. The pursuer therefore obtained decree in terms of his libel.

Act.—Fraser, Mair. Agent—John Galletly, S.S.C.—Alt.—Scott, M'Laren. Agent—A. K. Morison, S.S.C.

ELLIS v. ELLIS.—May 26.

Sequestration—Trustee—Process—Sisting Parties.—Reduction of an agreement between Clement Ellis and his brother James, by which the latter took over the whole business of Ellis & Son, with all its liabilities, and relieved defr., Clement Ellis, therefrom. The L. O. (Ormidale) reduced the agreement on the ground that it was obtained by misrepresentations and concealment to the lesion of James Ellis, and ordered the case to be enrolled for determination of questions of accounting between the parties, reserving questions of expenses. After the date of the L. O.'s interlocutor, defr. became bankrupt. The trustee on his sequestrated estate lodged a minute stating that he did not propose to insist in the reclaiming-note; but he desired to be sisted as a party so far as regarded the matters of accounting which remained to be disposed of, on the footing that he should not be liable for expenses previously incurred in the question of reduction. After discussion, the Court held that it was not competent at present to allow the trustee to sist himself in terms of his minute. There was no doubt as to the general rule that a trustee under a sequestration, by sisting himself in room of the bankrupt, adopts the contract of *litiscontestatio*, and thus makes himself liable to the opposite party for all the expenses of the process, whether prior to his being sisted or subsequent. But here it was alleged that the application of this general rule would involve hardship and injustice. The case was peculiar, because the trustee, who wished to take no part in the reductive part of the action, but only in the accounting, could take no benefit from the proceedings in the former, which had been entirely adverse to the bankrupt. All that the Court could decide at this stage—when the reductive conclusions were not disposed of, the question of expenses reserved by the L. O. not being determined—was, however, that the trustee could not now be sisted in terms of his minute. Their Lordships, therefore, refused to allow the trustee so to sist himself, and, in respect of his not appearing after intimation, refused the reclaiming note, found the pursuer entitled to expenses of the whole cause, and remitted to the L. O. The Court indicated an opinion that afterwards the question would arise purely in the Outer House, whether the reductive conclusions were not separable from those for count and reckoning, so as to allow the trustee to sist himself with reference to the latter only.

JENKINS v. ROBERTSON, &c.—May 27.

Process—Caution for Expenses.—Declarator of right of way through the lands of Blackfriars Haugh and North College, near Elgin, belonging to defrs. The case was held by the Court of Session to be ruled by the judg-

ment in a previous action; but the House of Lords, on appeal, held that the prior judgment did not constitute *res judicata*, and the action came back for further procedure. On 19th March, 1869, this Division appointed pursuer, who is a shoemaker in Elgin, to find caution to defrs. for the expenses of process by the fifth sederunt-day in May thereafter, in respect that he was not the true *dominus litis*, but was put forward by other parties as the ostensible pursuer in an action in which he had no more interest than any other member of the public. The pursuer now presented a petition for leave to appeal against this interlocutory judgment. He stated that he had not found caution, and did not intend to do so, being advised that the judgment of March 19, 1869, was not well founded; and he contended that the judgment in question virtually put an end to the cause, and that there would be no opportunity, as in the case of an ordinary interlocutory judgment, to get it reviewed at the end of the cause. The Court held that to grant the petition would simply be to reconsider their previous judgment, and to allow the pursuer to continue the litigation without finding security for expenses (which he was quite able to do, having rich backers), and therefore refused it.

STEWART v. STEWART.—June 3.

Husband and Wife—Separation—Process.—In this case the L. O. (Gifford) granted decree of separation against defr., a large landed proprietor in Scotland, awarded to his wife, the pursuer, £500 a year as aliment, and found her entitled to the custody of her youngest child, a daughter aged four years. The defr. reclaimed.

Lord DEAS said, as to the preliminary objections, that even if the practice of the Commissary Court had been to have lists of witnesses served on the opposite party, that was altered by the Act 1850, which provided that in such cases there might be trial by jury, and since which, if not before, the practice had certainly been the same in this respect as in jury trials. Neither was this a case for the examination of the parties, there being nothing occult as to which their evidence might be required. As to the third preliminary question, the demand for additional evidence to prove (1) that the defender is not insane, but (2) that he is of a very excitable temperament, this should not be granted, seeing that these facts were not disputed by pursuer, and were already sufficiently established by the evidence. Upon the merits, pursuer's demand in this action was one to which the law did not readily or willingly listen. There were, in fact, many ways in which a husband might inflict considerable cruelty on his wife without entitling her to a decree of separation and aliment. Husbands and wives take each other for better and for worse, and there must be cruelty of an aggravated description before such a decree can be pronounced contrary to the vow so undertaken. Without determining in the abstract what degree of cruelty was required, which was only necessary in a narrow case upon the evidence, he would look at the case as it stood upon the evidence. The parties were married in 1847, and had eight children, of whom five are alive; and the husband was not only a man of large estate, but also one of excellent ability and highly distinguished as a scholar. But it was necessary to look to the facts that had happened. Until 1859, the history of their married life does not appear, except that in 1852 defr. was in a lunatic asylum for eighteen months; but it was not alleged that he had

been insane since, though undoubtedly nervous and excitable. He had often used very opprobrious terms and bad language towards her as early as 1859, calling her by such terms as "blackguard," "fool," "vagabond," "liar," and having threatened violence. In 1861, in York Place, Edinburgh, he seized her rudely by the hand, and pinched her hand. In 1862, he locked her in the drawing room, and used very violent language, and created such alarm that she went out by the window to escape and came in again by the door. The precise degree of violence on that occasion does not appear; but it is certain that defr. used threats, and she was so alarmed that she left his house and remained away nearly a year. That was the first important act of violence, and was the more material, because during the pursuer's absence, defr. wrote letters to her, in one of which he used language the reverse of complimentary, and in another he intreated her to return, and promised to acquiesce in a separation if she would give him one final trial and that should fail. This was proof under his own hand (1) of his using bad language, and (2) that pursuer had then good cause for leaving him. After her return, defr.'s language from 1862 to 1869 was not improved, and his conduct culminated in this, that on 6th July, 1869, some words between them having taken place in the drawing-room, the pursuer came out of the room, and in descending the stair he struck her violently with his clenched fist several times on the head, that she fell, and was taken up helpless, and remained for some time speechless. This led to her bringing this action. He struck not a single blow, but several, and this was a serious thing, not only in itself, but as showing what might afterwards take place. Of late his Lordship had tried cases in the Criminal Court, in which death followed from blows of the fist on the head, which showed no external injury. Defr.'s conduct, as proved, was to be compared with his letter to his wife's brother on 26th July, in which he admitted having given her slaps on the face, and justified his doing so. As to the justifications alleged by defr., no provocation was shown ever to have been given. Upon the question whether the infant daughter should be allowed to remain with her mother for a few years, he could see no expediency in removing the child from her father and the family.

The other Judges concurred, and the L. O.'s interlocutor was affirmed, except in regard to the custody of the youngest daughter.

Act.—Sol.-Gen., Clark, Marshall. *Agents*—Mackenzie, Innes, & Logan, W.S.
—*All.*—Watson, J. C. Smith. *Agents*—Maitland & Lyon, W.S.

EARL OF BREADALBANE *v.* LORD ADVOCATE.—*June 9.*

Succession-duty—Entail.—Reduction of certain documents, and declarator that the Earl was entitled to repayment of certain sums paid as succession-duty. The question, which was as to the proper rate of assessment for succession-duty, in respect of part of the entailed estates of Breadalbane, depended on the construction of s. 2 of 16 and 17 Vict., c. 51, which provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon

the death of any person dying after the time appointed for the commencement of this Act, or to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settler, disponent, testator, obliger, ancestor, or other person from whom the interest of the successor is or shall be derived. The question arose whether John, first Earl of Breadalbane, who made an entail in 1704, or the third Earl who made an entail of the same and of certain additional lands in 1775, was the predecessor of the present Earl, to whom he succeeded in the sense of the statute. In the former case he would pay, as the descendant of a brother of the settler, duty at the rate of 5 per cent. on the value of the succession; in the latter case he would pay, under the last clause of sec. 10 of the statute, duty at the rate of 10 per cent. on said value.

The L. O. (Ormidale) held that the present Earl took under the deed of 1775, under which he had made up his title, and that he was bound to pay 10 per cent.

Pursuer reclaimed.

LORD PRESIDENT.—In all such cases the first question was, whether the person succeeding takes by devolution of law or by disposition. He was satisfied that the Earl took by disposition, and the only question was by what disposition—by the deed of 1704, so far as related to the lands thereby conveyed, or by that of 1775. The Act was designedly and carefully framed in non-technical language, because it was applicable to all the three kingdoms, and the meaning was to be ascertained by the ordinary rules of construction. There was no technicality so far as the Act was concerned; but the Court was compelled to examine the Earl's legal title in order to ascertain what deed had the legal effect of giving him the succession. His Lordship thought the question not difficult, and agreed with the L. O. Under the tailie of 1704, the present Earl would have taken under the last substitution to the heirs-male of the maker, the first Earl, whom failing, to the heirs-male whomsoever of his son John, Lord Glenorchy. But many other such heirs of the first Earl might have taken—*e.g.*, the late Marquis; and if so, the question might have now arisen whether one of these heirs, taking in succession to another, would not have taken by devolution of law. That question was not settled by *Lord Saltoun's* case. But this was not the disposition under which the Earl held the estate, and the question therefore did not arise. By the deed of 1775, the third Earl did not intend to contravene the entail of 1704, but, on the contrary, to give full effect to it. His Lordship reviewed the deed of 1775, and the narrative of the purposes for which it was prepared, and concluded that he must hold the Earl bound to take up the succession under it, or forfeit the estate, and therefore that the crown was right in contending that it was the deed under which the succession came to him. Three differences were to be noted between it and the deed of 1704; the fetters were different, the resolute clause in the earlier entail being defective and in this valid. It carried, moreover, additional lands; and, in the third place, it obliged the heirs succeeding to hold both sets of lands under the new tailie, and no other title, under pain of forfeiture. That forfeiture would be incurred as to

the whole estate if the Earl were to hold any part of it under the title of 1704.

Lord DEAS—The question was novel and difficult. If the granter of the deed of 1775 had had full power to dispose of the estate as he chose, or even to grant such a deed as that of 1775, it was clear that that was the deed under which the succession came to the pursuer. But it must be conceded that the third Earl had no power to execute that deed; and if it had been challenged within the prescribed period, his Lordship did not see any answer that could be made. Its challenge was now prevented by prescription, and by the fact that the granter of the deed of 1775 conveyed thereby other and valuable lands, so that the heirs called under it could not take both estates without acquiescing in the whole deed. The whole question was, whether these two things made the third Earl settler of the whole estate, including that settled in 1704; and his Lordship, with hesitation, came to the conclusion that they did, and therefore concurred.

Lord ARDMILLAN concurred.

Lord KINLOCH declined.

The result is that the Earl of Breadalbane is liable to pay succession-duty at the rate of ten per cent.

Act.—*Decanus*, Adam. *Agents*—*Adam, Kirk, & Robertson, W.S.*—*All.*—*Sol-Gen*, Clark, Rutherford. *Agent*—*Solicitor of Inland Revenue*.

DUMBARTON NEW STEAMBOAT COMPANY, &C., v. CLYDE NAVIGATION TRUSTEES.—*June 10.*

Partnership.—*Clyde Navigation—Shipping Dues Exemption Act, 1867.*—Prior to Clyde Navigation Consolidation Act, 1858, the resident burgesses of Dumbarton were entitled to exemption from certain rates leviable in the river Clyde and at the harbour of Glasgow. That Act continued the exemption during the lives and residence in Dumbarton of the burgesses existing on 10th June, 1858, but declared that it should thereafter cease and determine. The Shipping Dues Exemption Act, 1867, abolished all exemptions from dues on account, *inter alia*, of "any ship or goods being the property of, or consigned by or to, any particular person or body corporate;" but it provided that compensation should be paid by the person or corporation, entitled to receive the dues, to persons or bodies-corporate entitled to, and having derived profit from, such exemption during the year preceding 1st Feb., 1867; such compensation being an annuity equal to the average annual amount of profit so derived during the three years next preceding said 1st Feb., 1867. The New Dumbarton Steamboat Co. (a private copartnery), and Messrs John Mac-Millan, William White, and William Paterson, resident burgesses of Dumbarton, now the sole partners, claimed compensation from the Clyde Trustees in respect of their vessels, Leven, Lennox, and Lochfyne. The Trustees refused to entertain the claim, on the ground that the steamboat company was not a person or a body-corporate, and, separately, that they had ceased to have a right to such exemption, and were not in a position to derive profit from it in respect of the vessels Leven and Lennox, which had been sold before the passing of the Act. The Lochfyne was employed during the whole year before 1st Feb., 1867, the Leven up till 10th Nov., 1866, and the Lennox till 27th Dec., 1866. The par-

ties agreed on this special case, in which the questions for the opinion of the Court were:—(1) Whether the company is entitled, as a company, to compensation, and if so, to what extent and amount, and for what period? (2) Whether the said John MacMillan, William White, and William Paterson, as partners of said company, or as individuals, are entitled to such compensation, etc.? The Court found the claimants, as individuals, entitled to compensation, calculated on an average of the three years' profits; but held that the company, which was neither a person nor a body-corporate in the sense of the statute, could not be allowed compensation, and found no expenses due to either party.

Act.—Shand, M'Lean. *Agents*—J. & R. D. Ross, W.S.——*Alt.*—Sol.-Gen. Clark, Watson. *Agent*—J. Webster, S.S.C.

SECOND DIVISION.

MACINTOSH v. M'GILLIVRAY AND FRASER TYTLER.—May 20.

Non-entry—*Wadset*—*Summons*.—Reduction improbation and declarator of non-entry of the lands of Bochrubin, against Mr M'Gillivray of Dunmagglass, heir-male of the pursuer's last immediate vassal in the said lands, and Colonel Fraser Tytler of Aldourie, alleged sub-vassal of the said lands. The conclusions of the summons were in the usual form, concluding, first, for reduction of the defender's titles as forged and fabricated; and alternatively for declarator of non-entry and payment of the retour duties up to the date of citation, and the full rents of the lands from that date till entry. The alternative, however, in the present case was so expressed as to make the conclusions for non-entry dependent upon the defendant (M'Gillivray) producing a good title to the lands.

Decree in absence passed against M'Gillivray, reducing his titles in terms of the reductive conclusions of the summons; but appearance was entered for Colonel Fraser Tytler, who produced a progress of titles vesting him in the lands in question as sub-vassal of M'Gillivray, the immediate vassal; and the question came to be—(1) whether the immediate vassal's titles having been set aside, the sub-vassal's did not fall along with them; and, (2) whether in any view, Colonel Tytler, was not liable to be decerned against under the alternative conclusions for non-entry.

The L. O. (Barcaple) decided both questions in favour of defr., holding that the decree in absence against M'Gillivray was *res inter alios acta*, and could not prejudice Colonel Tytler; and, as regards the second, that the pursuer was barred by a certain wadset granted by his ancestor, Eneas Macintosh, to William Fraser, the ancestor of defr., from insisting in any of the conclusions of the action as against him.

The pursuer reclaimed, and confined his argument to the second question. The Court adhered. *Held* (1) That it was probably enough for the decision that the pursuer's summons was so framed as to be exhausted by the decree of reduction following upon the failure of M'Gillivray to produce his titles; (2) That, supposing that difficulty overcome, pursuer's right of superiority on which his action was based was when the action was brought substantially vested in the defr., Col. Tytler, in virtue of the wadset referred to; (3) That although it was stated that that wadset was in course of being redeemed,

and had in fact been redeemed at the recent term of Whitsunday, the rights of parties under this action could not be effected by anything which took place *pendent processu*.

Act.—Sol.-Gen. Clark, Marshall. *Agents*—Tods, Murray, & Jamieson, W.S.
—*Alt.*—Watson, Kinnear. *Agent*—James S. Tytler, W.S.

OLIVER v. WEIR'S TRUSTEES.—May 24.

Landlord and Tenant—Removing—Caution.—Suspension of a decree of removing obtained by the proprietors of Bogangreen and Muirside, Berwickshire, against their tenant in that farm, under the following circumstances:—Respta. raised a summons in the Sheriff Court of Berwickshire against the suspender founding on sec. 5 of A. S. 1756, and concluding that suspr., who was said to have deserted the possession of his farm, and left it unlaboured at the usual time of labouring, should be ordained to find caution for five years' rents of the lands, and, failing his doing so, that he should be decerned to remove from the possession. Suspr. having entered appearance, tendered a minute of defence denying that he had deserted his farm or left it unlaboured, as alleged. The S. S. (Dickson) refused to allow this defence to be minuted till suspr. found caution for violent profits in terms of A. S. 1839. On appeal, the Sheriff (Shand) affirmed the S. S.'s interlocutors, and suspr. having failed to find caution, decree of removing was pronounced. The suspension was brought. The L. O. (Mure) refused the note, taking substantially the same view as the Sheriffs. Suspr. reclaimed. The Court altered, and held that the whole procedure in the Court below had proceeded on a misconception of the nature of the action, which was not an action of removing at all, but an *action for caution*, to which the provision of the A. S. of 1839 was wholly inapplicable. No doubt there were conclusions for removing failing caution being found for five years' rents; but the action did not become an action of removing till pursuer's right to have such caution found had been ascertained in the ordinary course by pursuer establishing the facts on which his libel was rested.

Their Lordships accordingly recalled the L. O.'s interlocutor, and remitted to the L. O. to remit to the Sheriff with instructions to recall the previous interlocutors, to receive the defences, and to proceed with the cause, and to find *suspra*. entitled to the expenses of the suspension.

Act.—Scott, Brand. *Agent*—D. Milne, S.S.C.—*Alt.*—A. Moncrieff, Kinnear.
—*Agents*—Hamilton, Kinnear, & Beaton, W.S.

M.P.—RITCHIE v. MACLACHLAN AND OTHERS.—May 27.

Order to pay—Bill—Assignment—Stamp.—In this case (see above, p. 331) one of the claimants, Henry Maclachlan, claimed a preference over the account due by Sir Norman Lockhart to the common debtor, in respect of a docquet endorsed by the common debtor upon his account, and intimated to and acknowledged by the raiser Ritchie, Sir Norman's agent, for election expenses. This docquet, which was written over a penny draft-stamp, was in the following terms:—"Pay the above account, amounting to £267 11s, to Mr Henry Maclachlan." It was contended for the competing claimants (1) that this docquet amounted to a bill of exchange, and was as such inadequately stamped, and therefore invalid; (2) that, if it was not a bill of exchange, it was not a *habile*

document to transfer the grantor's right, and, if it was, it then amounted to an assignation, and was void as not being stamped with the appropriate stamp.

The Court sustained the docquet as creating a preference from the date of its intimation to and acknowledgment by the election agent. Their Lordships held that such a document was not a bill, since the sum was the amount of an account, and was therefore not certain. If it had been a bill, however, the stamp was sufficient, as it would have been a bill payable *on demand*. Neither was it an assignation, because, taken by itself, it transferred no right. Its true character was that of a mandate, but a mandate recognised by the debtor in such a way as to constitute a new obligation by the debtor in the mandatary's favour. Being of that character, it had the effect of vesting the debt in the mandatary, in so far as the mandate could be shown to be *in rem suam*; and as it was not disputed that it was *in rem suam* to the extent claimed by the claimant founding on it, that claimant must be preferred to all the arresters whose arrestments were subsequent in date to the acknowledgment by the election agent.

Another question was raised with reference to an arrestment used upon the dependence of an action, and the schedule in which bore that the sum arrested was "£50 less or more." It appeared that the expenses of the action brought up the claim above £50, and the question was whether more than the £50 could be recovered. The Court (Lord Benholme diss.) held that an arrestment on the dependence covered the whole sums which might be decreed for on the action, including expenses, and that the mention of a certain sum "less or more" in the schedule did not constitute a limitation.

SIMPSON v. CARNEGIE.—May 27.

Lease—Grass Seeds.—Appeal from Cupar-Fife. The action was brought by Mrs Simpson, as trust-proprietrix of the lands of Pitcorthie, against Mr Carnegie, tenant of Easter Pitcorthie, for £50 11s, as the price of grass and clover seeds sown down by the late George Simpson, the pursuer's author, with the crop of the year 1866, immediately preceding defr.'s entry. The question turned upon the construction of defr.'s lease, and there was also the further question how far it is competent to add to the obligations of parties in a formal lease other obligations derived from common law or the custom of the country.

The S. S. (Bell) found for pursuer, holding that the lease, fairly read, supported her contention. The Sheriff (Mackenzie) altered, and, taking a different view of the import of the lease, held that it was inadmissible to supplement its provisions by reference to the common law.

The Court returned in substance to the interlocutor of the S. S., and sustained the appeal, and continued the case till parties might settle how the value of the seeds was to be ascertained.

Act.—Shand, Mackay. Agent—Alex. Howe, W.S.—Alt.—Sol.-Gen. Clark, Balfour. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

DODS v. CRAWFORD.—May 27.

Sale—Warranty.—Appeal from Paisley. Action upon the warranty of a horse, the parties being John Dods, farmer at Stoneypath, East-Lothian, pursuer, and Hugh Crawford, horse-dealer, at Bruntshields, near Kilbarchan,

defr. Pursuer bought the horse from defr. at Gifford Fair in March, 1869, and the question came to be whether there was evidence of an *express warranty* in terms of the Mercantile Law Amendment Act, which requires such express warranty to found liability in a seller for latent defects. The S. S. (Cowan) found for the pursuer. The Sheriff (Fraser) reversed, and held that what had passed amounted merely to a statement of the pursuer's belief that the horse was sound, and did not imply a guarantee. The Court returned to the judgment of the S. S., and decerned against defr.

FRASER v. CLAPPERTON & BALGARNIE.—May 31.

Partnership—Bankruptcy—Reduction—Sheriff.—Appeal from Haddington, in a petition brought by the trustees for the creditors of D. Brown & Co., drapers, Edinburgh and Haddington, against Margaret Fraser, draper in Haddington, for the ejection of Fraser from the shop in Haddington in which David Brown & Co. carried on business, and for interdict against her selling or disposing of any part of the stock, etc., in said shop. The defence was that the respt. had purchased and obtained possession of the business in question, and the whole stock, etc., belonging to it, from John Barr Glen, one of the two partners of the firm prior to the date of the trust-deed in pets.' favour. Pets. contended (1) that this alleged purchase was fraudulent and collusive; (2) that Glen being only one of the partners of the firm, had no power to make the sale in question, that being an act of extraordinary administration, and there having been no consent on the part of the other partner to the proceeding, although there had no doubt been certain conditional arrangements for Glen taking over the Haddington shop. The S. S. (Shirreff), after proof, refused the petition, holding respt. to have been well vested in the subject in dispute prior to the trust-deed. The Sheriff (Shand) reversed, and found for the pets. on the second ground above indicated, stating, at the same time, that he was satisfied that the transaction between Glen and the respt. was collusive, but that he did not think the agreement between the parties, which was regular and formal, could be set aside on that ground in the Sheriff Court.

The Court adhered to the Sheriff's judgment on both grounds, and observed that it was a great mistake to imagine that a trustee for creditors could not get the better of a fraudulent deed to the creditors' prejudice by proceedings in the Sheriff Court. A reduction was not competent, but the Bankruptcy Act expressly provided that such deeds could be set aside by way of action or exception.

Act.—Pattison, J. A. Orichton. Agent—R. P. Stevenson, S.S.C.—Alt.—Sol.-Gen. Clark, Strachan. Agent—J. S. Mack, S.S.C.

THOMSON v. HENDERSON & Co.—June 3.

Sale—Guarantee.—Appeal from Glasgow. The action was brought by John Henderson & Co., tea merchants, against Fraser Thomson, writer, for £50 to account of the price of teas supplied by pursuers to one Archibald Buchanan, upon a guarantee by defr. in the following terms:—"Glasgow, Dec. 2, 1867.—Gentlemen, I hereby guarantee payment to you of Mr Archibald Buchanan's account for teas, to be furnished to him by you on credit, to the extent of £50 sterling. This guarantee is granted on the understanding that you are to give him credit to the extent of not less than

£400 sterling, and this guarantee shall stand until recalled." The defence was that pursuers had not given credit to the amount stipulated, but only to the extent of £289; and further, that they had, within a few months of the date of the guarantee, and before the ordinary period of credit had expired, used arrestments and brought an action against Buchanan for the teas furnished him, whereby his credit was destroyed, and he was compelled to give up business. The S.S. (Dickson) decerned against defr., holding (1) that pursuers had given Buchanan all the credit he had asked, and that was sufficient implement of the condition in the guarantee; (2) that the action was proved not to have been raised till the course of dealing contemplated by the guarantee had come to an end, and Buchanan had intimated that he was giving up business. On appeal, the Sheriff (Ball) adhered, and further repelled a plea stated in defence, to the effect that the guarantee required a stamp. Defr. appealed.

The Court affirmed the Sheriff's judgment, taking the same view on both points.

ADDISON AND OTHERS v. WHYTE.—June 7.

Process—Title to sue.—Reduction of a settlement executed by Miss Helen Lobban of Cullen, whereby she bequeathed her whole estate to defr. Pursuers were poor persons residing in Cullen, who, under a previous settlement, might have been nominated by her trustees to receive certain annual pensions, and who had in point of fact been so nominated.

The L. O. (Ormidale) found pursuers had no title to sue, and dismissed the action.

Lord Justice-Clerk—The questions raised are of some difficulty, but I do not think the result is attended with difficulty in the shape in which the action is presented. It is an action by persons who say that they belong to a class favoured by a certain deed, under which they might have benefited if the trustees chose to nominate them, and they also say that the trustees did nominate them. I shall assume that the pursuers are members of the class in question; and that that class is sufficiently designed in the deed to bring the case within the rule of *Ross v. Heriot's Hospital* and the other cases referred to. I do not think the proceedings of the trustees in any way aid the pursuers, since, while the other deed stands unreduced, the trustees are not entitled to do any act in that capacity. But this is not an action against trustees to compel them to execute their trust. It is a direct action against a disponee of the deceased to set aside that disponee's title, and such an action can only be brought by a person who has or may have the character of representative of the deceased. This is strongly brought out in *Rodger* (9 S., 671), where Lord Moncreiff held that pursuers had no title to sue, in respect they had not confirmed as executors-creditors, and so vested themselves with the character of representatives of the deceased. And *Rodger's* case was more favourable than the present, because the pursuers here never could be in a position to make up a title in their own persons as representing the deceased. I do not think the cases quoted by the pursuers give any assistance. *Gray* (M. 8062) was the case of a special legatee, and the question arose in a suspension of a charge given by the executor upon the bond which was the subject of the legacy to the father of the

legatee who was the debtor in it. In *Crs. of Balmerino* (M. 10,421) the rubric is misleading. The Court did not sustain the pursuers' title to reduce, but only their title to pursue the declaratory conclusions, which were quite in a different position, since no man can be prevented from declaring any right which lawfully belongs to him. Whether the pursuers have any other remedy, whether they can bring the executors into the field and compel them to sue, whether they can in any way compel them to assign their right to sue, I give no opinion. In the circumstances as presented I concur with the L.O.'s judgment.

M'GECHAN v. STARKS.—June 10.

Reparation—Crossing Sheep—Lying in Harbour.—Appeal from Falkirk, in an action of damages for personal injuries against the master of the steamship *Caffraria*. The allegation was that the pursuer was, on 25th Aug., 1868, employed in discharging a lighter into the *Caffraria*, then lying in the port of Grangemouth, and that having occasion after dark to cross the *Caffraria* to the shore, he fell into the hold of that ship, through an opening in the deck (the fore-hatchway) having been left uncovered, and thereby broke his right leg and sustained other injuries. The defence was that the accident had happened through the pursuer's own negligence in crossing the ship at an improper place, there having been a suitable crossing place, provided with lights, at the after-part of the ship. The S.S. (Bell) found for the pursuer, and awarded £100 damages. The Sheriff (Blackburn) reversed, and assolizied. Pursuer having appealed, the Court returned to the S.S.'s interlocutor.

Act.—*Millar, Q.C., Orr Paterson. Agents—J. & A. Peddie, W.S.*—*Alt.*—*Shand. Agent—J. Webster, S.S.C.*

OUTER HOUSE.

(Before Lord Ormisdale.)

DENNISTON v. GREENOCK WATER COMPANY.—Nov. 16, 1869.

Commissioners—Clerk—Commissioners' Clauses Act 1847—Law-agent—Employment.—Action by Mr Denniston, writer in Greenock, to recover a sum of £2299 12s 9d for professional services as law-agent rendered to defra., and an arrear of £58 6s 8d, being an unpaid portion of the pursuer's salary as clerk to the Commissionera. The defence was, in substance, that pursuer was not employed by defra. as their law-agent, but was bound to do the work charged for as clerk; as also that the charges were extravagant, and the work not properly done. Defra. also pleaded, as a preliminary plea, that "the pursuer's claims, except for his salary as clerk, are excluded by the Acts under which he was appointed, and Acts incorporated therewith; in particular, by the 10th and 11th Vict., c. 16, s. 67." The L. O. repelled it as preliminary, reserving the effect of the clause of the statute with regard to the merits. His Lordship adds this note:—

Note.—The pursuer avers that the accounts or claims libelled, other than his official salary, were incurred for business which did not fall within his duties as clerk to the Greenock Water Trust, but were incurred to him on the special employment of the Water Commissioners as a professional law-

agent. The L. O. has in the meantime reserved this point, as it may depend in some measure on investigation and evidence. But the defenders insisted that according to the spirit, if not the letter, of the statutory enactments on which their second plea in law is founded, the action is excluded, and therefore that it ought in respect of that plea to be at once dismissed. The L. O., however, being of opinion that the defender's second plea in law as so maintained is ill-founded, has repelled it.

By s. 65 of the Commissioners' Clauses Act, 10 Vict., c. 16, a clerk and other officers may be appointed to "assist in the execution of this and the special Act;" and by section 67 it is enacted that "every officer employed by the Commissioners who shall exact or accept an account of anything done by virtue of his office, or in relation to the matters to be done under this or the special Act, any fee or reward whatsoever, other than the salary or allowances allowed by the Commissioners, or who shall be in any wise concerned or interested in any bargain or contract made by the Commissioners, shall be incapable of being afterwards employed by the Commissioners, and shall forfeit the sum of fifty pounds, and any person may sue for such penalty by action of debt, or on the case, in any of the Superior Courts, and shall on recovery thereof be entitled to full costs of suit." The defenders argued that, although this enactment does not in so many words declare that an officer of the Water Trust shall not be entitled to enforce payment of any fee or reward which has been promised and is due to him over and above his official allowance, but only subjects him to penalties, yet it is clear that any transaction such as is referred to in the statute entered into by an officer of the Trust in relation to his official duties, can afford him no legal claim to fee or reward. This, it was maintained for the defenders, is a result necessarily arising from the statutory enactment. But the Lord Ordinary has been unable to satisfy himself that the statutory enactment in question applies to the present case at all. He reads it as applying only to the case of an officer of the Trust accepting or exacting a fee or reward from third parties, over and above the fair and just remuneration or salary to which he is entitled from the Trust. It could not, indeed, in any event be held to strike at the accounts and claims now sued for, except on the assumption (before there has been any inquiry into the matter) that the business charged for by the pursuer falls within his official duties, and is covered by his official salary, and is not of a different description entirely, and performed as the pursuer avers, and undertakes to prove, under a special employment which entitles him to remuneration for the work done by him independently altogether of his official position and salary. But if the pursuer establishes his averments, then surely the statutory enactment in question can have no application, for it expressly excepts from its operation "the salary or allowances allowed by the Commissioners." Now, whatever the Commissioners have engaged to pay and allow the pursuer as remuneration for business or services performed by him on their special employment, independently of his official duties, may fairly be held to fall under the excepted category of "allowances allowed by the Commissioners." On the other hand, should it turn out that the pursuer never received any special employment, and that the business and services charged for by him were of such a nature as to fall within his official duties, and accordingly covered by his official salary, the defenders will prevail in respect of pleas other than that now under consideration.

It only remains to be noticed that the defenders, in support and illustration of what they maintain to be the true meaning and effect of the statutory enactment on which their second plea in law is founded, appealed to the analogies afforded by the common law principle, that no person standing in a fiduciary position is entitled to anything which has or may have a tendency to conflict with the duties of that position. They argued that the pursuer, as clerk of the Water Commissioners, stands in such a fiduciary position as to preclude him even under special employment from charging anything but his official salary. The Lord Ordinary cannot say that he sees much force or soundness in this view of the matter. On the contrary, he thinks it to be untenable. It is not, indeed, comprehended by the defender's second plea in law, which is alone at present in question, and which, as expressed, is founded exclusively on statutory enactment. But, supposing it were covered by the defenders' plea, the Lord Ordinary can see no sufficient reason for entertaining it. He finds that no countenance was given to it in the case of *Forbes v. The Magistrates of Banff*, 23d February, 1856, 18 D. 646, where business accounts for general trouble and agency were held not to fall within the duties and were not covered by the official salary of a town-clerk, but that the town-clerk was entitled to charge and obtain judgment for such accounts irrespective altogether of his official salary.

Act.—Decanus, Guthrie. Agent—D. J. Macbair, S.S.C.—Alt.—Sol.-Gen. Clark, Shand. Agents—Murray, Beith, & Murray, W.S.

(Before Lord Gifford.)

PTN.—A.'s TRUSTEES.—*May, 1870.*

Trustees—Trusts Act, 1867.—Petition under s. 14 of the Trusts Act, 1867, by the trustees appointed by the deceased A. under a deed dated 11th Sept., 1851, whereby he conveyed to them, *inter alia*, a sum of £2000 due to him, and vested at the time in trustees for the purposes of his marriage-contract with his wife, executed in 1831. By the deed of 1851 the truster made certain larger provisions for his wife, which she accepted in lieu of her previous marriage-contract provisions, and which were paid to her after A.'s death in 1864. His widow died in 1869. The marriage-contract of 1831 had provided her in the liferent of a house and furniture, which the husband, however, had power to sell, settling on her the price in lien thereof. The sum of £2000 had accordingly, on the sale of the house, been vested in the marriage-contract trustees. All of these trustees are dead, and this petition was presented to enable the trustees under the deed of 1851 to get a title under the recent Act to uplift the money and discharge the bond. The case having been remitted to a man of business, he, in his report, raised the question whether the 14th section of the Trusts Act applies to the case of trustees becoming entitled to property held by the trustees under a lapsed trust. Lord Gifford, however, granted warrant to the petitioners to complete a title in their person to the heritable bond in question, adding this note:—"The Lord Ordinary thinks that the present is a case to which the provisions of the 14th section of the Trusts (Scotland) Act, 1870, fairly apply. No doubt, the petitioners are themselves trustees, and therefore 'not entitled to the absolute possession for their own absolute use' of the bond and property in question. It appears to the Lord Ordinary, however, that the object of the statutory provision was to

give the ultimate beneficiary under the lapsed trust, or any one in his place, right to make up titles in the mode prescribed. The expression, 'for his own absolute use,' plainly means an absolute right as against the deceased trustees, or as in a question with the lapsed trust. The late A. would plainly have been entitled to avail himself of the provision. It appears to the L. O. that his trustees have the same right."

Act.—Guthrie. Agents—Dundas & Wilson, C.S.

HOUSE OF LORDS.

WATT v. THOMSON AND LIGERTWOOD v. WATT.—May 24.

(In the Court of Session, July 18, 1868, 6 Macph. 1112).

Reparation—Judge—Privilege—Sheriff-Clerk.—Appeal from Second Division of the Court of Session. Watt, acting as agent for Mrs Moust, presented a petition to the Sheriff of Aberdeen, praying for interdict to prevent a certain sale. Mr Duncan, the advocate for another party, had previously lodged a caveat against this application, and on both the agents meeting before the Sheriff, he decided, after reading the documents, that he would refuse the interdict. Thereupon Watt said he would withdraw the petition, and took it up from the table and went away, notwithstanding that the Sheriff requested him not to take the document away. Thereafter the Sheriff granted a process caption or warrant of imprisonment, authorising the apprehension of Mr Watt till he returned the document, and he had been actually imprisoned for nearly 24 hours, when he was discharged on the application of the Sheriff-Clerk. All that the Sheriff-Clerk did was said to be merely the issuing and directing the execution of the process. Mr Watt, however, raised an action for reduction and damages against the Sheriff-Substitute, Mr Thomson, the Sheriff-Clerk, Mr Ligertwood, and Mr Daniel, the Sheriff-Clerk-Depute, who was acting at the time. The L. O. (Barcable) dismissed the action as incompetent against both the Sheriff and the Sheriff-Clerks; but the Second Division dismissed the action only as against the Sheriff, and allowed the allegations against the Sheriff-Clerks to go to proof. Both the Sheriff-Clerks now appealed against this part of this interlocutor. Watt appealed.

The LORD CHANCELLOR (Hatherley).—In the case of Watt against Thomson the pursuer had complained that the warrant of imprisonment was illegal, and ought to be reduced, and that damages ought to be awarded for the injury to the pursuer's reputation by the fact of imprisonment. The narrative on which his claim was founded was very singular. It appeared that both the parties in a legal proceeding had duly appealed to the Sheriff, and that the Sheriff had come to a decision on the subject-matter of dispute; that Mr Watt, on finding his petition was dismissed, claimed and possessed himself of the petition, and went away with it, in spite of the remonstrances of his opponent and the Judge, who claimed to retain the document as belonging to the Court. The first contention as to this matter was that there was no depending process in the Sheriff Court, and so that the Sheriff had no power to issue a warrant of imprisonment to recover back the document which had been so abstracted. Now, it would be difficult to say what was a depending process if this was not one, seeing that both

parties were present contesting the matter, and that the Sheriff, after hearing both, gave his decision. Therefore there could be no doubt the Sheriff was entitled to issue this warrant. It was next argued that the appellant was entitled to withdraw the petition. That, however, he could not do after the Court had become possessed of it. The Sheriff had made his order upon it, or rather he had refused to make an order upon it, and then the pursuer lifted it from the table; and on the Sheriff-Substitute, at the instigation of Mr Duncan (that is, the opponent) "asking him to return the petition to the clerk for the purpose of having a warrant of service written on it, the pursuer, as such a proceeding was useless to his client without an interim interdict, did not hand it to the clerk, but took it away, having thereupon left the room with it in his possession." Now, in other words, it came to this—If we take away the expression "instigation" (which is a word of evil import) it came merely to this,—that the person in whose favour the case had been decided, and who saw the petition in the hands of the Sheriff (who was the Judge), was desirous that it should be in the proper custody, which would be that of the Sheriff-Clerk in such a case. He was desirous that it should be in the custody of the Sheriff-Clerk, and he asked the Sheriff-Substitute to direct that the pursuer should deliver it to that proper custodian; and accordingly the Sheriff, at the request of the other litigant, did ask the pursuer to return the petition to the clerk, which request of the Sheriff the pursuer wholly disobeyed, and in spite of the request, took it away, and left the room with it in his possession. He could have no hesitation in saying that the Sheriff in directing that document to be returned was acting judicially and in the course of the discharge of his proper functions, and that the pursuer in so taking it away, after being directed to deliver it to the proper person, was guilty of a clear contempt of the Court. Then it was alleged that the Sheriff acted maliciously in issuing the warrant, but no other foundation for this was stated than that the Sheriff took offence at the appellant for carrying off the document. The only suggestion of malice was that Mr Thomson was offended with the pursuer for not handing the petition to the clerk as ordered. No doubt that might seem very wrong and improper, and (his Lordship supposed) petitioner would desire to lead by that assertion to this conclusion,—that the Sheriff-Substitute, without cause of any description, chose to take offence at the pursuer's conduct, and maliciously to revenge himself upon the pursuer for conduct which had offended him, without any other assignable cause or reason for his coming to such a conclusion as he came to—namely, that it was proper to issue a process caption. But, on the other hand, if you take this view—that the pursuer's conduct was, as the Court below held, and as he must distinctly conclude, most unjustifiable, and that he was guilty of very gross contempt of Court in removing that which he was bound not to remove, and in subsequently walking away with the petition when he was ordered by the person who had authority to order him to return it—then the offence that the Judge takes at such conduct was a very just offence, and was simply such offence as every Judge in the discharge of his duty to the public ought to take as an irregularity committed in the face of the Court; and when the malice, which is said to arise in the mind of the Judge, is simply coupled with this allegation of offence at the conduct of the pursuer, the malice is simply reduced to this,—that the Judge, acting judicially, coming to the conclusion

that a very gross contempt of Court had been committed in his presence, and being justly offended at that act, took this mode of punishing the offence, which the pursuer avers to be an irregular mode. It must be taken, therefore, that there was no proper allegation of malice, except what was implied from the very facts of the case. The Sheriff had throughout merely acted as a Judge. The issuing of the warrant was done almost immediately on the appellant going off with the document of the Court. It was all one transaction, and this case was not different in its circumstances from that of *Hamilton v. Anderson*, in which the House had affirmed the doctrine that for a judicial act, whether right or wrong, a Judge is not liable. If it be possible that the Sheriff-Substitute might be wrong in directing this process to be served under the circumstances here stated without this intimation having been given, it appeared to make no difference in the case, provided he did what he did in his judicial capacity, as it seemed plain to his Lordship that he did. Seeing before his own eyes a great wrong committed, he did not take the course that he might have taken of immediately committing the pursuer on the spot, but within a few minutes of the person having unlawfully abstracted the document, he took judicial proceedings to have it recovered—he sitting there judicially and before the judicial sitting was over. And whether the whole proceeding was right or wrong, I apprehend makes no difference whatever to the position of the Sheriff. If it was right, of course he was fully justified; if it was wrong, the proper course was to appeal from the order and obtain a reversal of the order. Supposing the order had been reversed, would the Sheriff have been answerable? Clearly not. If the Sheriff was not answerable, you get this consequence following from it—namely, that whatever the result of the process of reduction, he is not the custodian of the document, and he has no interest in the document; it is a matter of entire indifference to him whether it stands or whether it is reduced. If it be reduced, he will not be liable in the other part of the action which seeks damages; if it stand, of course there is an end of the case. Therefore, taking the case either the one way or the other, the Sheriff has no interest whatever in the proceeding that has taken place. The Sheriff, therefore, was clearly not liable in this action, and the interlocutor of the Court must be affirmed, so far as regarded him. As to the other case of *Watt v. the Sheriff-Clerks*, the case was somewhat different. When those who are officers of the Court are sued for imprisoning said parties under process, their only defence is that the process is regular and valid. If the process be set aside, it was clear their protection is gone; they are not in the same position as Judges. It was not a sufficient defence to them that they acted without malice, and as this second case does not clearly show that the proceedings were regular, the only course was to allow the action to go on, and the merits to be gone into. It was to be regretted that the House could not on this occasion dispose of the whole litigation by pronouncing some final judgment; but the state of the record prevented it. The interlocutor on the second case against the Sheriff-Clerks must therefore be affirmed with costs.

Lord COLONSBAY said he concurred. There could be no doubt that this was a depending process when the document was carried away by Mr Watt. The document ought to have been treated as in the custody of the Court, and the process caption was a perfectly correct mode of recovering the document. There was no proper allegation of malice against the Sheriff,

who merely acted judically. With regard to the Sheriff-Clerks, as they were the proper custodians of the document, it was proper that they should satisfy production, and that the action should be allowed to go on against them; for they were not acting judically, and their proper defence depended on the validity of the process which they caused to be executed.

LORD CAIRNS: My Lords,—In the first of these cases which your Lordships have heard, the question which was presented to your Lordships for consideration, in the first instance, was, whether the petition for an interdict, which was the origin of the whole of this litigation, was really a part of a process depending in Court. My Lords, upon that point I entertain no doubt. The petition was an application to a judicial officer for the exercise of his judicial power. The party against whom that power was to be exercised had notice of the intention to present the petition. He in his turn presented a caveat praying to be heard should the petition be offered to the Court; and so far as the petition and the statement upon it were concerned, the parties had actually joined issue upon the record and had been heard upon those statements. The result, therefore, was this,—that, on the one hand, the petitioner whose petition had been dismissed had a right of appeal from the order that had been made upon his petition; and, on the other hand, the party against whom the petition was directed had the right of having it placed upon record; that with regard to the statements in that petition, he had been held to be right and the petitioner wrong. And it appears to me that the Court itself also had as a matter of duty the obligation of taking care that a judicial order of that kind, passing upon a petition of this sort, should in some way or other be recorded in the Court, and that the petition should therefore be detained in Court for that purpose. My Lords, I do not stop to advert to what was said, that the petitioner himself wished to withdraw his petition. I think the time was too late to make any application of that kind. When the petition had been heard and the order passed upon it, it was out of the power of the petitioner to withdraw his petition. I therefore think your Lordships will have no doubt or hesitation in holding that this was the case of a process in Court which had become one of the documents of the Court, and ought to have been treated as such. Then, if your Lordships take that view of it, let us observe for a moment what was done. The petitioner, as I said, claimed the right to withdraw his petition; he claimed the right not only to withdraw it as a process, but to carry it away out of Court. That was objected to by the Judge. The Judge said, I think very properly, that it was one of the documents of the Court, and ought not to be taken away. Notwithstanding that remonstrance the petitioner, I might almost say forcibly, took the document out of Court and left the Court with the document. In that state of things it appears to me, I might almost say beyond all doubt, that it was a case in which the Judge ought in his judicial capacity to have made some order or other upon the subject. It was a matter that could not possibly be allowed to rest as it then stood. It was the bounden duty of the Judge to take steps, and I think he would have failed in his duty if he had not in some way or other taken steps, by means of the exercise of his judicial power, to have that document, so improperly taken away, brought back to the Court. Now, let us consider, in the next place, what is the averment with reference to the question of the Judge being actuated by malice in what he appears afterwards to have done. It is said

that the order which he made, he made maliciously, because he was offended at the conduct of the petitioner in withdrawing the petition. My Lords, I treat these averments as perfectly idle and unmeaning. It is well settled that the mere introduction of the word "maliciously" will not be sufficient unless you shew facts from which you are entitled to conclude that there was malice in the mind of the Judge; and as to saying that in this case the Judge was offended at the misconduct of the petitioner, it is simply saying that grounds existed in the mind of the Judge leading him to make the order which he afterwards made. But then it is said that in the order which was made there was irregularity, or, as it has been called in the argument, "illegality," a word which, I think, perhaps somewhat confuses the case, and is a word not so good as the word "irregularity." Now, we start with this, that it was a case in which it was necessary and proper that a judicial order should be made, and that there is no malice properly averred to have existed in the mind of the Judge. We have, therefore, to consider nothing but the question of irregularity. Now, the two points of irregularity which are relied upon are these:—First, it is said,—Supposing this petition to be a process in Court, no receipt had been given when it was taken out of Court. My Lords, no receipt certainly had been given, because it was taken away forcibly and against the protestation of the Judge, and the idea of giving a receipt would have been at variance entirely with what actually occurred in Court. Although I do not think it necessary, for reasons which I will state hereafter, that we should decide in this case on the question of irregularity as to the non-existence of a receipt, it seems to me that it would be absurd to treat it as a grave question. For my own part, I have no doubt at all in saying that I think absence of a receipt in no way made the proceeding by process caption an improper or irregular proceeding. But then the next alleged irregularity is this:—It is said that the petitioner had no notice that a process caption was going to be applied for and issued against him. Now, on the one hand, the argument is this:—It is said that whatever may have been the views of the petitioner as to his rights in withdrawing this process—whatever may have been the impropriety of his conduct in taking it away—if he had had notice served upon him that a process caption, which is a proceeding that may result in imprisonment, was going to be applied for, he perhaps would have brought the petition back, and have saved himself the irksomeness and disgrace of being put in confinement; on the other hand, it is said that although it is quite proper in ordinary cases when a suitor has rightfully taken a process out of Court, giving a receipt for it promising to bring it back, that he should have notice that a process caption is going to be applied for to make him bring it back, and to make that possession, which originally was rightful, a wrongful possession, the same reasons do not apply at all to the case where a man has, as it were, waived the necessity for notice, when he has insisted not merely upon his right to borrow the document, but his right to carry it away without any consent or permission on the part of the Judge or his clerk. When he has done this in the face of the Judge, and done it in spite of the protestation and order of the Judge, it is said that that is a case where the person so conducting himself has waived the necessity for notice, and that the case is ripe in point of time for issuing at once a process caption, in order to bring the matter to an issue with the person who has claimed to stand upon that view of his rights. My Lords, I do not think it is necessary that you should decide which of these two arguments

is right, because if your Lordships go along with me in saying that this was a case in which it was proper that the Sheriff should make an order, and in which the order made by him was a judicial act, it seems to me to follow of necessity that the act of the Sheriff being a judicial act, we cannot hold the Sheriff liable, even if in point of regularity something was omitted to be done in making that order which ought to have been done. It would, of course, put an end to the position of all persons filling a judicial office of this kind if, in place of their orders being merely liable to be set right upon appeal, the Judges themselves were to be held answerable for the regularity of their orders; in other words, for the proper exercise of their judicial powers as regards the regularity of the orders that they might make.

It appears to me, therefore, that the case at the very most is a doubtful case,—that there is an argument which might be a very proper argument if an appeal from this order was before your Lordships or before an Appellate Court; but that for the purpose of holding the Judge liable to a proceeding of this kind, there is no illegality in what he has done sufficient to enforce that liability. I think, therefore, that the case which has been so often referred to of *Hamilton v. Anderson* is a perfect precedent for holding that at this stage of this suit the view should be taken that the Sheriff has no interest whatever in this order,—that the production of it, or the non-production of it, is a matter with which he has no concern, because in no way can this action of reduction and for damages be made available against him for the consequences of the order he has made. I therefore entirely concur with what my noble and learned friend on the woolsack has proposed, that the first of these appeals should be dismissed, and dismissed with costs.

I have only one word to say upon the second of these appeals. I regret very much that it has been brought here. I think it would have been much better if the two gentlemen who are the appellants in the second appeal had been content to allow the proceeding to go on in the way in which the Court of Session proposed that it should go on against them. I am afraid it must go on against them. It appears to me that their position is this:—They clearly are not judicial officers, and if they justify themselves for the act of arresting and putting into confinement Mr Watt, they must do it upon the ground that they acted under a proper and regular order. As long as the order stands, it is a perfect justification for what they did; but if the order is quashed, then they will no longer have it to appeal to as their justification. Now, this is a proceeding for the purpose of quashing the order, and for the purpose of obtaining damages, supposing it should be quashed. Now, I think, at this stage all that your Lordships have to ask yourselves upon this part of the case is—Is there a question to be tried? If the allegations are so perfectly idle and absurd that you can say that there is no question whatever to be tried as to the irregularity of this order, then I should not be at all unwilling to say that even at this stage of the case we might interpose and say that it was an idle thing to reduce an order upon which no proceedings for reduction could really be founded. But, my Lords, I am not prepared to say that there is no case to be tried. I think it better to abstain from expressing any view as to which of the two arguments upon the question of notice (which really is the only question to be tried) is the right one—whether there ought or ought not to be notice in this case. The case must go further; and, therefore, I think it is better to abstain from expressing an opinion, though I have an opinion upon

this point. It is sufficient now to say that it appears to me that the question is not altogether so vain and so idle as that we should say that there is nothing whatever to be tried upon that point. My Lords, I am the more led to that by this reason,—that if we were to decide now one way or the other, either that there ought or that there ought not to have been notice before the process caption was issued, we should be virtually settling the law not only for this case but for the practice of Sheriffs' Courts in the future. Now, I think that it would be a very inexpedient and a very improper thing to do that at this stage of the case, without any closed record and without any power of making any declaration in the order which we should pronounce. We have not now at this stage any power to asscize the defenders from the conclusions of the summons. I think, therefore, however one may regret that further litigation should ensue, there is sufficient allegation here to prevent our saying that there is not a case to be tried, and that the Court of Session are right in saying that the action must go on against the appellants in the second appeal. My Lords, I regret, I repeat, that that appeal has been brought here, but as it has been brought here, I think your Lordships can do nothing with it but dismiss it also with costs.

Interlocutors affirmed in both cases, with costs.

KEITH v. REID.—*June 16.*

(In the Court of Session, May 13, 1868, 6 sec. 768).

Lease.—Miss Reid, the proprietor of a shop in Aberdeen, in 1862 presented a petition to the Sheriff to interdict and prohibit Mr Keith, the occupier, from selling goods on the premises by public auction. She set forth that the shop had been let to Fraser as a grocery and wine business, for two years from Whits. 1861, and that it was a condition between the parties that assignees and sub-tenants should be excluded, unless such as should be approved of by the landlord. Fraser, after occupying the premises some time, removed to another shop, and Keith applied to take respt's shop for a china and glass shop, but expressly stating that he did not intend to hold any auction there. Ultimately appt. arranged with Fraser to take the lease off his hands, and agreed with respt. to get a new lease prepared, and meanwhile he obtained possession. When he entered he at once began to use the shop for sales by auction, and Miss Reid objected to execute the lease. Appt., in answer, stated that all through the negotiations the landlord well knew the purpose for which he intended to use the premises, and that her agent consented to this use. The Sheriff, after proof, dismissed the petition. On appeal, the L. O. (Jerviswoode) held that Miss Reid had failed to prove that any condition against sales by auction was annexed to the letting, and that there was nothing to prevent the tenant holding such sales, and that they did not amount to an inversion of the possession. The Second Division unanimously reversed, and held that no such use of the shop had been consented to by the landlord, and that she was entitled to have the interdict.

Lord WESTBURY observed that the pleadings were full of the most rambling and vague allegations. It was astonishing how so small a point could be concealed under such voluminous details.

Lord CHELMSFORD—This certainly is a most disgraceful litigation about a matter of the smallest possible kind.

The decision of the Second Division was reversed.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT, ARGYLESHIRE.—Sheriffs CLEGHORN and HOME

WHYTE v. BLACK.

Reparation—Consequential Damages.—Gilbert Black, farmer, Keppoch, Kintyre, in August, 1868, sold to pursuer, James Whyte, potato merchant, Glasgow, a quantity of potatoes growing on his farm, and in February following pursuer chartered a vessel to convey said potatoes, along with others he had purchased in the neighbourhood, to Dublin, to be disposed of in the market there. In consequence of some dispute in regard to the price of the potatoes sold by defr. (about ten tons), he delayed to give delivery, and thus caused the detention of the vessel for three days at Ardpatrik, the port nearest defr.'s farm. The vessel thereafter proceeded to Gigha to take in more potatoes, but when there a storm took place which caused a further detention of nine days, and when the vessel arrived in Dublin, the demand for potatoes had ceased, and pursuer was obliged to carry them to various markets in England and Wales, and to dispose of them at considerable loss. In these circumstances, he contended that had the vessel not been detained through defr.'s fault at Ardpatrik, the further detention by the storm at Gigha would have been avoided, and it would have reached Dublin in time for the market there, and he sued defr. for £400 as the loss of profit on the entire cargo, together with the loss and expense incurred in disposing of the potatoes elsewhere. The following are the interlocutors of the S.S. and the Sheriff:—

Inveraray March, 12, 1870.—Finds, in point of fact, that a vessel was employed in February, 1869, by the pursuer to convey to Dublin certain potatoes he had purchased from the defr. and from other parties: Finds, in point of law, that,—although it were proved that the vessel was delayed as alleged by the pursuer from the 17th to the 20th February, and that that delay was the fault of the defr., that a further delay took place at Gigha in consequence of a storm, which prevented the vessel reaching Dublin till the 6th of March, and that she would have avoided the storm and reached Dublin on the 22d February, but for the previous delay at Ardpatrik,—the damage arising from this is not direct but consequential, and the defr. is not liable therefor: Therefore assoilzies the defr. from the conclusions of the action: Finds him entitled to his expenses: Appoints an account to be given in, and remits to the auditor to tax and report, and decerns.

Note.—This case seems to the S.S. one of some difficulty. The allegation of the pursuer is, that he bought a certain quantity of potatoes from the defr. which he meant to ship for Dublin along with a considerable quantity which he had bought elsewhere in the same district; that in consequence of the failure of the defender to cart the potatoes or allow them to be carted to Ardpatrik, the vessel, instead of being ready to start on the 17th, was delayed till the 20th February; that she proceeded from thence to Gigha; that while there the wind changed, and a storm rose which prevented her arriving in Dublin till the 6th March, whereas, if she had not been delayed by the defr.'s fault, she would have reached Dublin on the morning of the 22d February; that between the 22d February and

6th March the price of potatoes fell £2 10s or £3 a ton; and that he in consequence sustained a very great loss. The defr., on the other hand, denies that there was any blame for the delay attaching to him, and, further, that the damage alleged to have been thus sustained is not direct but consequential, and that he is therefore not liable for it.

The first question, then, which falls to be decided is—Was the conduct of the defr., supposing the pursuer's allegation as to it to be correct, such as to render him liable in damages for the alleged loss of the market at Dublin, either on the whole or any part of the vessel's cargo? If the vessel were said to have been delayed twelve days at Ardpatrik by the defr.'s fault, instead of three days, then, and in consequence, nine days more in the course of her passage by a storm, it is clear the defr. would have been liable; but the storm is alleged only to have produced this delay as a consequence of the defr.'s delay. It is not alleged that the storm was an extraordinary one, or that it was at all impossible that, if the vessel had left Ardpatrik on the 17th, she might have equally been prevented by the weather from reaching Dublin till the 6th of March. On the contrary, it is well known that the weather is uncertain at all times for the passage from Gigha to Dublin, but especially in the winter months. The pursuer left a margin for the arrival of his cargo, which might have been sufficient or might not, and the timeousness of that arrival was one of the chances of his speculation. No direct damage is claimed for the three days' delay, but only for the delay consequent upon that delay, it being at the time of the alleged delay by the defr. uncertain whether the second delay might not take place equally whether the first took place or not. As it turned out, according to the pursuer's allegation, the second delay would not have taken place but for the first; but if the pursuer chose to run, or, at least, did run, matters so close as that in his shipment, it is surely scarcely fair to make the defr. responsible for the results of his close shaving, even though he may have been in fault. And though it may be hard on the pursuer to have to bear the loss, if the defr. was really in fault in the matter, the S.S. is disposed to think it would be harder on the defr. to make him responsible for one of the rubs of an uncertain speculation.

The pursuer relies much on the opinion of the Lord C. J. Cockburn in the English case of *Thompson v. North Eastern Railway Co.*, 30 Law Journal, p. 71, but it does not seem to the S.S. that the cases are at all parallel. The circumstances there were that a vessel from an accident to her rudder chains ran on an obstruction in a dock or harbour, which was there through the defr.'s fault; and the law is laid down as applicable to a case where, through *pure accident*, circumstances arise which would not have been attended with disastrous results but for an obstruction arising from the negligence of another. But in this case the quality of being "a pure accident" is entirely wanting. An accident, according to Dr Johnson, is in this sense "that which happens unforeseen;" and surely no one will affirm that a gale at Gigha in February can be at all called a thing which happens unforeseen. On the contrary, it was one of the chances or probabilities in the shipment which was almost as great whether there was delay on the defr.'s part for three days or not, and therefore, as seems to the S.S., hardly a fair case for damages.

On appeal, the Sheriff (14th May, 1870) finds that the pursuer avers a breach of contract on the part of the defr. in delaying from the 15th to

the 19th February, 1868, to deliver ten tons of potatoes purchased from him by the pursuer in October previous, and that he has thereby sustained damage to the extent of upwards of four hundred pounds in respect the vessel employed to receive the potatoes at Ardpatrik, after sailing therefrom to the island of Gigha and loading another portion of her cargo there, was detained by a storm for nine days and prevented reaching Dublin, her destined port, till the 6th March, while she might, but for the detention at Ardpatrik, have reached Dublin on the 22d February, and escaped the storm which began on that day; and that between the 22d February and 6th March the market price of potatoes at Dublin had declined greatly and the demand almost ceased, so that the whole cargo of about seventy tons became unsaleable there, and had to be disposed of elsewhere at great loss and expense: Finds, that although it were proved that the defr. wrongously delayed to deliver the potatoes as alleged, he would not be liable for the damage averred, as being in its nature remote and consequential; therefore dismisses the action as irrelevant, assoilzies the defr. from its conclusions as laid; finds him entitled to his expenses, of which appoints an account to be lodged, and remits the same to the auditor to tax and report, and decerns.

Note.—The Sheriff feels the difficulty of deciding a nice question of consequential damage without a proof; but as the averments of the pursuer are very specific, and a proof would evidently be very expensive, he has given judgment on the relevancy, believing that this course will best meet the views of the parties and the justice of the case. He has attentively examined the authorities referred to in the able pleadings, and in Mr Guthrie Smith's valuable chapter on the "Measure of Damages," in his *Law of Reparation*, p. 472, and he considers the general rule of law to be that in the case of a breach of contract the measure of damage is the direct and necessary, or at least the natural and probable, result of the failure, and such as might have been in the contemplation of the parties. Now, here, what was the natural result of failure to deliver ten tons of potatoes to a merchant?—plainly, a loss of profit on the resale of these ten tons; and what was the natural result of a delay to deliver?—surely the difference of market price, if it fell during the delay, along with any expense of demurrage or otherwise caused by waiting.

But the defr. is here sought to be made liable for the consequences of a storm which detained the vessel after receiving the potatoes, and in a subsequent part of its voyage for nine days, but to which detention the vessel is alleged to have become liable in consequence of the previous detention of three or four days by the defr.'s default. The Sheriff cannot find any precedent for giving damages in these circumstances. On the contrary, the case seems to fall under the rule which refuses remote or consequential damage. If such a claim as the present were relevant, a class of actions would be introduced of a most perplexing nature, and the dread of which would be most harassing in business transactions. There would scarcely be a case of detention by storm or contrary winds, or other accidents of the sea, where the party suffering by it might not go back to some previous part of the voyage and fix on some one who by a day's or an hour's delay or obstruction might have rendered himself answerable for the various eventual losses of the voyage or speculation. And it is impossible to read the present record without seeing what an amount of hypothesis is involved, and what an interminable proof might be led to trace out all the

probabilities of the course of a sailing vessel, and of the effect of wind and weather varying over a wide extent of sea passage.

It is further to be noticed that it is not merely the loss on the potatoes delayed to be delivered which is here charged against the defr., but the loss on the whole cargo, of which the ten tons in question were only about a seventh part. The pursuer seems to confound breach of contract with delict, and reasons as if the defr. had detained the vessel by interdict or arrestment, or by some injury which prevented her sailing, which would have been necessary to make it relevant to charge him with loss arising on the whole cargo. Indeed, the pursuer seems conscious of this, for in his summons he describes the vessel as "awaiting the said potatoes and *unable to proceed on her voyage without them.*" But there was nothing to prevent the vessel proceeding on her voyage, and it was a matter for the discretion of the pursuer or his brother-in-law, who was acting for him and communicated with him by telegraph on the 15th February, the day when the difficulty arose, whether to sail at once without risking a change of wind or to delay the day or two involved in yielding to the defr.'s demand. If he judged wrong in the course he took, he cannot throw the eventual consequences on the defr. Had the defr. refused delivery on any terms—say, because he had consumed the potatoes or sold them to another purchaser, the vessel would have left, and the utmost the defr. could have been found liable in would have been the loss of profit on the ten tons. But it is argued that having only delayed delivery for three days, he is liable in an amount of damages more than ten times the value of the subject sold. This seems a *reductio ad absurdum*, and, at all events, it is a result which could never have been contemplated by the parties in a sale of two acres of potatoes.

The Sheriff had at first some difficulty in dismissing the action, because the defr., if in default, was liable at least in any expense of demurrage for the three days the detention is alleged to have lasted; though, in fact, on the pursuer's own showing and the face of the documents in process, the period of delay was only one or two days. But, first, the pursuer, in his reclaiming petition makes no point of this; then it appears from the condescendence (Art. 15) drawn in October, 1869, that the master of the vessel even then only "claimed demurrage" at 30s a day for this detention in February, 1868; and, above all, the amount at best is so trifling that it would have been unsatisfactory to both parties to prolong the litigation in regard to it; but the form of the interlocutor would not exclude the pursuer, if he has to pay the master's claim, from bringing a small-debt action for the amount.

SHERIFF COURT OF LANARKSHIRE, AIRDRIE—Sheriffs LOUIE and HENRY GLASSFORD BELL.

JOHNSTON v. NORTH BRITISH RAILWAY.

Acts 8 Vict., c. 17, sec. 139, and 8 & 9 Vict., c. 33, sec. 130—Railway Company—Citation.—Question, whether a railway company can be legally cited at the place where the contract had its local origin by a common law citation at one of their ordinary traffic stations on the line, or whether it must be given in terms of the statute at a principal office of the company.

The following interlocutors were pronounced by the S. S. and Sheriff respectively:—

Airdrie, 15th April, 1870.—Having heard parties' procurators on the preliminary plea for the defrs., that their place of business in Airdrie, where the summons was executed, not being the principal office; nor one of the principal offices of the defrs. within the meaning of the statutes 8 Vict., c. 17, sec. 139, and 8 & 9 Vict., c. 33, sec. 130, and not being alleged to be so in the execution appended to the summons, there has been no proper service on the defrs., and the action will fall to be dismissed; and having made avizandum with this plea, for the reasons stated in the subjoined note, repels the same, and appoints the cause to be put to the roll on this interlocutor becoming final or being affirmed on appeal, that parties may now be heard on the merits.

Note.—The Sheriff-Substitute has arrived at the conclusion that this plea must be repelled with great hesitation, and after an anxious consideration of the various authorities on the point. The English case of *Garton v. The Great Western Railway Coy.*, 12th June, 1858, 27 Law Journal, Q. B. 375, decided by Lord Campbell, then Chief-Justice of the Queen's Bench, is entirely in favour of the defrs' plea, and had there been no adverse decisions in the Supreme Courts of this country, it would have been his duty to have given effect to a judgment founded on the construction of the Act of Parliament given by so eminent a Judge. But decisions in our own Supreme Court, sustaining the citation in circumstances similar to the present, and in which the authority of the case of *Garton* was quoted and disregarded as an authority, are entitled to more weight, and must be held as settling the law of Scotland upon this point.

The first case is that of the *Aberdeen Railway Coy. v. Ferrier*, 28th January, 1854, 26 Jur., 198. In that case *Ferrier* had raised an action against the *Aberdeen Railway Coy.* in the Small-Debt Court at Brechin, and a copy of the summons was left with the agent at the company's station at Brechin, and another copy was transmitted through the post-office to the company addressed to the principal office in Aberdeen. The Railway Company declined the jurisdiction, in respect their principal domicile was at Aberdeen. The Sheriff repelled the plea, and the Court, without calling upon the respondent's counsel, unanimously sustained the judgment, the Lord President remarking—"Here is a company carrying on business as carriers in Brechin, and I think that they were lawfully summoned in Brechin." Lords Ivory and Robertson concurred, as did also Lord Rutherford, the latter observing—"I think they are lawfully sued at the place where the contract was entered into." But it may be said this only decided that the company are liable to be sued at the place where the contract was entered into, or, as in the present case, where the *culpa* which is the ground of action is said to have taken place; but as the company were summoned at common law at Brechin and under the statute at Aberdeen, it may have been the latter citation which the Court rested its judgment upon, and held to be good service.

This argument, however, was entirely disregarded in the next case that came before the Court—viz., in *Dick v. The Great North of Scotland Railway Coy.*, 8th October, 1860, 33 Jur., 2. This case was originally brought in the Sheriff Court of Elgin, and the summons was served by leaving a copy for the defrs. at their station at Keith. A preliminary plea

having been taken by the defra., that their only principal office being in Aberdeen, service was not made in terms of sec. 130 of the Railways Clauses Act, it was repelled by the Sheriff-Substitute (Gordon). The judgment was reversed by the Sheriff, who sustained the plea, and dismissed the action, adding a long note explaining the grounds of his judgment, which will be found *ad longum* in the *Scottish Law Journal*, vol. 2, p. 133. The case having been appealed to the Circuit Court at Aberdeen, the railway company maintained that the Railway Acts required notice to be sent to the principal office of the railway, or to one of the principal offices, if there be more than one. They referred also to the English case of Garton before mentioned, and pled that the case of Ferrier did not apply, because there the statutory notice had been given; but the Court having Garton's case before them, as well as the fact that citation had only been given at the trading station of Keith, recalled the interlocutor appealed against, and sustained the citation of the respondents. Lord Ivory is reported to have said—"If it had been necessary to rest the judgment on the statute, more might have been said of the English case which had been quoted. But going, as the Court was doing, on the common law, the case was not of value, because they really knew nothing of the common law of England, or as to the citation of corporations or trading companies." And according to the report in the *Law Journal*, the Lord Justice-Clerk said, that in the case of Ferrier "the Court did not rest their judgment at all upon the fact of the copy of the summons being sent to the principal office at Aberdeen." The case of Dick, therefore, appears to be on all fours with the present.

The Sheriff-Substitute has been referred by the defra. to two recent judgments in Sheriff Courts in which decisions of an opposite character have been given. The one by Sheriff-Substitute Bell of Falkirk, affirmed on appeal by Sheriff Moir, is based exclusively on the case of Garton. The other, by Sheriff-Substitute Guthrie Smith of Dundee, is founded both on the case of Garton and on that of *Edward v. The Inverness and Aberdeen Junction Railway*, 24th April, 1862; *Irv. 4, 185*.

Enough has been already said in regard to the case of Garton. The case of Edwards, it appears to the Sheriff-Substitute, when carefully considered, is not an authority in support of Mr Guthrie Smith's decision. In that case the cause of action arose in the county of Elgin, and the summons was served at Keith, in the county of Banff, and also at *Inverness, their head quarters*. The Sheriff-Substitute dismissed the action on the ground of no jurisdiction, and the Circuit Court, on appeal, held that he was right in so doing, Lord Neaves observing that neither the case of Ferrier nor that of Dick ruled the present. "In each of these the defender was cited at the place where the contract locally had its origin;" and Lord Ardmillan adopts the same view. He says, "The Sheriff is the true Judge Ordinary of the bounds, and where the delict or origin of action is within his jurisdiction, the defender is bound to answer; but the appellant does not profess to show us any authority, or any reason apart from authority, for holding that the railway is to be held responsible at every station along the line; and where, as here, the cause of action is in Elginshire, the company is cited at Inverness, and the action is brought before the Sheriff of Banff, I see no principle or authority for sustaining his jurisdiction."

What has been fixed by these decisions therefore is, that the words of

the statute, that the company "may be served," etc., are not imperative but optional, leaving it to the pursuer to serve the summons either by the common law mode, or in the manner prescribed by the statute; and, secondly, that railway companies are bound to answer, in each county through which their line passes, for all acts done within that county.

In accordance with these principles, the cause of action in the present case being in the Airdrie district, the Sheriff-Substitute is of opinion that the defenders' plea falls to be repelled.

Glasgow, 13th May, 1870.—Having heard parties' procurators under the defenders' appeal, and reviewed the whole process, Finds that by the "Railway Clauses (Scotland) Act, 8 and 9 Vict., cap. 33, sec. 130," and by the "Company Clauses Consolidation (Scotland) Act, 8 Vict., cap. 17, sec. 137," both of which have been incorporated with the Act under which the defenders' company is now constituted, it is provided "that any summons or notice, or any writ or other proceeding at law requiring to be served upon the company, may be served by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary; or in case there be no secretary, then by being given to any one director of the company:" Finds that the execution of citation annexed to the summons instructs that the defenders were cited to this action by leaving a full double of the summons with a citation "in the hands of a servant within their office at South-side Station, Airdrie:" Finds that the defenders aver, and the pursuer does not seriously dispute, that said station is merely an ordinary traffic station, of which there are two in Airdrie, and is in no sense a "principal office" of the defenders' company: Finds that the above-quoted provisions of the said statutes are not merely permissive but imperative; and not having been complied with, there has been no proper service on or citation of the defenders: Therefore recalls the interlocutor appealed against, sustains the defenders' preliminary plea, and dismisses the action; but of consent finds no expenses due, and decerns.

Note.—Dwarris, in his work on "Statutes," says (p. 604):—"Words of permission shall in certain cases be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word *may* means the same as the word *shall*; so if a statute says a thing *may* be done which is for the public benefit, it shall be construed that it *must* be done." Whether this rule was applicable to the statutory enactment quoted in the above interlocutor, was fully considered in the Court of Queen's Bench in the English case of *Garton v. The Great Western Railway Company*, 27 Law Jour., Q.B. 375. It was there contended that the enactment was not imperative but permissive; but Lord Campbell (Chief Justice) decided otherwise, on the ground that it was for the sake of justice the citation was directed to be made at the head-office, which is that at which the directors meet, and is the great centre of management. His Lordship remarked—"If it be said that the notice served at a station on the line would probably be forwarded, and that redress should be facilitated, the answer is that the experience of courts abundantly proves the necessity of protecting railways from groundless litigation, and the Legislature has given the protection in question. In the 'Lands Clauses Act, 8 and 9 Vict., cap. 18,' and the 'Company Clauses Act, 8 and 9 Vict., cap. 16,' there is the same provision for service of legal proceedings. The Legislature has always required service at a principal

office, or personally on the secretary; or, if no secretary, on a director." Such being the rule in England, it is nevertheless said that there are decisions in our own Supreme Court which run counter to it. It will be found, however, on examining these decisions, that it is a mistake to suppose that they are antagonistic to Garton. The first is that of *Ferrier v. The Aberdeen Railway Company*, 26th January, 1854, in which there was no question of regularity or validity of citation, but only of competency of jurisdiction. The report expressly states that a copy of the summons, with citation, and copy of the account, was sent through the post-office, addressed to "The Aberdeen Railway Company, at their principal office, Aberdeen," whilst a copy was also left at the company's station at Brechin in Forfarshire. The only question raised was whether the company—which it was not denied had been duly cited by the service at Aberdeen—were subject to the jurisdiction of the Sheriff of Forfarshire; and the Court ruled that they were, on the ground that carriers are held to have a domicile at any place where they carry on business, and there was no doubt that the company carried on business as carriers at Brechin. But it is evident that this was a very different thing from holding that if the railway had been cited only at Brechin, the service would have been sufficient. The next case—viz., *Dick v. The Great North of Scotland Railway Company*, 8th October, 1860—was only a Circuit Court decision, and the Judges do not seem to have dealt with it as a case involving so much a question of citation as of jurisdiction. No doubt, the citation had only been given at the directors' station at Keith, in the county of Banff; but the pursuer maintained—and there is no contrary finding—that Keith was a principal station, being one of the terminal stations of the line where there was a "manager's room" and other extensive erections. The Lord Justice-Clerk, apparently ignoring any distinction between the circumstances of the two cases, said he was prepared to decide entirely on the authority of the case of *Ferrier*; and both he and Lord Ivory, who was with him, evading the question of citation, rested their judgment on the competency of the Sheriff of Banffshire to try the case, in respect, the Railway Company had a domicile within his jurisdiction. The only other Scotch case which has been alluded to is that of *Edward v. The Inverness and Aberdeen Junction Railway*, April 24th, 1862, Irvine's Justiciary Reports, vol. iv., p. 185; and this also is a Circuit Court case. But, as the Sheriff-Substitute has pointed out, it has really no bearing on the point now at issue, for there was there, as in *Ferrier's* case, service at the principal office at Inverness, as well as at a station in Banffshire, and the action was dismissed simply on the ground that whilst the cause of action arose in the county of Elgin, the summons was raised in the Sheriff Small-Debt Court of Banffshire, where there was no jurisdiction. Lord Neaves took occasion to point out that both in *Ferrier* and *Dick's* cases the defenders were cited at the place where the contract locally had its origin; but he adds—"I am not prepared to say that either of these cases would be authority for holding that any one having a claim against a railway company might cite that company at any station along its line." It thus appears that the only Scotch decision which has even the semblance of disregarding incidentally the rule laid down in *Garton* is the Circuit Court decision in *Dick*, and the Sheriff does not thereby feel himself entitled to disregard the authoritative interpretation put upon the statute on which the defenders found by the Court of Queen's Bench. The

Sheriff is fortified in the view he has taken (contrary to the well-stated judgment of the Sheriff-Substitute), by learning that in the year 1868 the then Sheriff and Sheriff-Substitute of Stirlingshire, and Sheriff-Substitute of Forfarshire at Dundee, gave effect to the same view in judgments pronounced by them.

Ad.—T. A. Macfarlane.—*Alt.*—Robt. Watt.

SHERIFF COURT OF RENFREWSHIRE, GREENOCK.—
Sheriffs FRASER and GUTHRIE.

M'INNES v. CAMPBELL.—April 6.

Summons—Filiation and Aliment—Specification of Time and Place of alleged connection.—The summons in this case merely concluded for aliment of an illegitimate child born on a date specified, "of which the defender is the father," without stating the time or place of the alleged connection. Defender maintained that this form of summons was irrelevant. The following interlocutors were pronounced:—

Greenock, 23d March, 1870.—The Sheriff-Substitute having heard parties procurators, Finds that the summons is irrelevant; therefore dismisses the same, and finds the pursuer liable in expenses of process; allows an account to be given in, and remits the account to the auditor of Court to tax and report, and decerns.

Note.—The Sheriff-Substitute was referred to the case of *Phillips v. Foster*, 1863, *Sh. Court Rep.* 20, in which Sheriff Fraser is reported to have stated a strong opinion that a summons of filiation containing any particulars as to connection between the parties, is improperly framed. He was also referred to the form in Soutar's styles. In the presence of such high authority the Sheriff-Substitute would not in this Court venture to pronounce judgment finding the present summons insufficiently libelled, were it not that in the case referred to, though an opinion was expressed, there was no judgment sustaining a summons so bare as in the present case. And as the Sheriff-Substitute has been informed that it is desired to obtain an authoritative judgment in favour of this form of summons, he conceives that he will best give effect to that wish by dismissing the action. While he has the strongest desire to encourage simplicity of pleading, the Sheriff-Substitute doubts whether the ends of justice are satisfied by a summons so meagre that the defender has no information, either as to the place or time of the act which he is charged with having committed, and which he has to contradict in his proof. The averment as to time might perhaps be left to inference from the date of the child's birth; but there is no indication in such a libel of the place, except what may be gathered from the designation of the parties. The Sheriff-Substitute cannot, with the greatest deference, perceive the bearing of the English case cited in *Phillips v. Foster* on the present question. The reason for alleging time and place in an action of divorce seems to apply with equal force in the present case; and besides, time and place are here necessarily in the knowledge of the pursuer, who can have no difficulty in framing her averments on these points, while in an action of adultery nearly the converse is the case. The Sheriff-Substitute believes that the course of practice is contrary to the course of the pursuer, and that no authority in

support of her position can be found in the decisions of the Supreme Court. On the contrary, the observation of the Court in the last case on the subject (*Pratt v. Mackie*, February, 1870), appear to be against it.

Greenock, 6th April, 1870.—The Sheriff having heard parties' procurators, of consent sustains the appeal, recalls the interlocutor appealed against, opens up the record to the effect of allowing the pursuer to amend her summons by setting forth the times and places of sexual intercourse with her and the defender, which resulted in the birth of the child in question, and the amendment having been made at bar, of new closes the record, and remits the cause to the Sheriff-Substitute to be further proceeded with as accords.

Act.—C. M'Culloch.—*Alt.*—J. C. Smith.

SHERIFF COURT, GREENOCK.—Sheriffs FRASER and GUTHRIE

GRANT v. CALEDONIAN RAILWAY COMPANY.—*May* 23.

Reparation—Railway—Level crossing.—John Grant, gardener, Woodhall, near Port-Glasgow, sued the Caledonian Railway Company for £500 sterling as damages and solatium due to him for the loss of his daughter, Jane Grant, aged 7 years or thereby, who on 3d Oct., 1867, was killed by a train on the defrs'. line of railway while she was attempting to cross the line at Carnegie Farm level crossing, near Port-Glasgow. The defence was non-liability on the ground (1) that the crossing was a private road belonging to the company, subject to use only by the occupiers of lands on the side of the lane; (2) no blame attachable to the defenders; and (3) blame with pursuer alone for allowing such a young child to attempt to cross a railway.

Greenock, 6th April, 1870.—The Sheriff-Substitute having heard parties' procurators, and considered the proof and whole process, Finds, in fact, that the pursuer's deceased daughter, Jane Grant, a girl six years and seven months old, was killed on the 3d day of October, 1867, while crossing the defenders' line of railway at Carnegie Farm level crossing, between Port-Glasgow and Bishopton, by the engine of the up train which left Greenock for Glasgow at half-past three o'clock P.M.: Finds that the deceased was going at the time from her home at Woodhall, a quarter of a mile distant from the said crossing on the south side of the defenders' line of railway, to buy fruit at a market-garden at Carnegie Farm, on the north side of the said line of railway, and was accompanied by her elder brother, Duncan Grant, thirteen years of age, and that when she reached the said crossing she waited with her brother till the down train which left Glasgow for Greenock at three o'clock P.M. had passed on the south or down line of rails: Finds that the deceased Jane Grant, immediately after the down train had passed, attempted to cross the rails behind it, and was struck by the engine of the said up train, and so severely injured that she shortly afterwards died: Finds that the engine whistle of the up train was not sounded as it approached the crossing, but that the said up train could have been seen approaching from the south side of the line, or from the gate on that side, by the deceased and her brother: Finds that the said level crossing is a private level crossing for the use of the occupiers and inhabitants of the said farm and gardens connected therewith: Finds that the pursuer has failed to establish any other fault against the defenders; and, in these circumstances, finds in law that the defenders are not liable to the pursuer in terms of the conclusions of the summons. Therefore assoilzies the defenders from the conclusions

of the action; finds them entitled to expenses, allows an account thereof to be lodged, and remits the same, when lodged, to the auditor of Court to tax and report, and decerns.

Note.—It was attempted to prove fault against the defenders, in respect that they had allowed the line to be crossed at Carnegie Farm by a level crossing instead of erecting a bridge, or, at all events, in respect that they did not station a watchman or gatekeeper at it; and much proof was adduced for the purpose of showing that the increase of traffic since the line was opened was such as to require one or other of these precautions. It is true that on certain days a considerable number of passengers cross the railway at this crossing, but even assuming that a legal obligation of this kind lay on the company, the Sheriff-Substitute does not think the evidence shows that there is a greater necessity for a bridge or a watchman than at other level crossings leading to a single farm or garden. Had such a necessity been proved the pursuer would have had difficulty in showing that that obligation could be founded on by persons other than the owners of the adjacent lands. (See *Monklands Railway Co. v. Waddell*, 23 D. 1167).

There is no ground for holding that the road across the railway can be regarded as a public road.

In such a question as arises here, it seems that the whole circumstances of the case are to be considered, and that it is a jury question, whether there has been such fault on the part of the railway company as to cause the accident or not? (See *Stubley v. L. & N.W. Ry. Co.*, 35 L.J. Ex. 3, 1 L.R. Ex. 13; *Stapley v. L.B. and S.E. Ry. Co.*, 35 L.J. Ex. 7, 1 L.R. Ex. 21; *Skelton v. L. and N.W. Ry. Co.* 36 L.J. C.P. 249, and other cases).

Here the only thing which has been proved against the defenders, in the opinion of the Sheriff-Substitute, is the omission to sound the whistle of the up train at approaching the crossing. It does not clearly appear, on the one hand, that the girl's life would have been saved if this precaution had been observed, and on the other, it seems to the Sheriff-Substitute that she would have been safe if she or her brother had looked along the line in both directions before she ran across behind the down train, instead of being entirely engrossed with that train. The boy and girl were either able to take care of themselves or not; and if not, they ought not to have been allowed by their parents to go by a road where vigilance and caution are required of the passengers, even if the utmost care is exercised by the railway company and its servants. While he has the deepest sympathy with the unfortunate parents of the child, the Sheriff-Substitute cannot find any ground on which he can hold the defenders liable in the reparation sued for.

The pursuer appealed, and the following is the interlocutor and note of the Sheriff:—

Edinburgh, 23d May, 1870.—The Sheriff having considered this process, sustains the appeal for the pursuer in so far as regards the finding for expenses: Finds no expenses due to the defenders; *quoad ultra* dismisses the appeal for the pursuer, and adheres to the interlocutor appealed against, and decerns: Finds no additional expenses due by the pursuer since the date of the Sheriff-Substitute's interlocutor.

Note.—Five different acts of fault are alleged against the defenders, for one or all of which they are sought to be made liable in damages:—(1) It is said that they ought to have kept a watchman at the level crossing in

question and failed to do so; (2) That neither the engine driver nor the fireman kept a look out when the train came to the crossing; (3) That the engine driver did not slow the engine when he came near the crossing; (4) That he did not sound the whistle; and (5) That a certain notice required by the rules of the defenders was not served upon the inhabitants of Carnegie Farm.

None of the private Acts of Parliament connected with this railway are in process.

But the Sheriff has examined them in the Advocates' Library. He finds that the Act authorising the construction of this railway received the Royal Assent on 15th July, 1837, (1 Vict., cap. 116). There are subsequent Acts, but this is the principal one. This statute was passed before the Railway Clauses Consolidation Act, which became law in 1845, and before the previous General Regulation Acts, 5 and 6 Vict., cap. 55, or the Act 2 Vict., cap. 97, all of which statutes are made applicable only to railways formed after they were passed. The Sheriff cannot find in any of the subsequent private Acts of the company that any of these three general statutes has been made applicable to this particular railway. Apparently it is assumed that the Railway Clauses Consolidation Act of 1845 has been incorporated with the private Acts of this company, because in the standing orders of the company (No. 51, page 24), that statute is referred to in reference to this very matter of level crossing, and made the basis of a notice to be given to the neighbouring proprietors. But the Sheriff can place no reliance on this reference to the Act, seeing that in the same standing order the Act 8 Vict., cap. 20, is also founded on, although the 144 section of that statute declares that this Act "shall not extend to Scotland." In these circumstances the Sheriff must deal with the case upon the footing that there is no statute law applicable to the undertaking, except the private Acts of the company itself.

In the private Act already referred to (1 Vict., cap. 116), the 202d section clearly contemplates that level crossings may be made. That section is in the following terms:—"Provided that the railway is not to be used as a passage for horses and cattle, except only in directly crossing the same at any roads or places to be appointed for that purpose." The 203d section also is in the following terms:—"And whereas it may be attended with very great danger if the said railway should be used by persons on foot, be it therefore enacted that if any person shall be, or travel, or pass upon foot upon the said railway, without the license and consent of the said company, unless for the purpose of attending any carriage under his care, or in crossing the said railway by any road or footing on the level thereof, and except the respective owners or occupiers of lands through which the said railway shall pass, and their respective servants in passing across, or over the same as hereinbefore authorised, every person so offending shall forfeit and pay any sum not exceeding £10 for every such offence." These are all the clauses in the statutes that have any bearing on the question. The history of the level crossing is told in the disposition No. 7 of Process, by James Foster King, and others, in favour of the Glasgow, Paisley, and Greenock Railway Co., dated 17th March, 1846, from which it appears that the railway co., and the proprietor of the Carnegie Farm, had come to an agreement that there should be a level crossing at the place where the accident happened for the use of that farm.

The level crossing, therefore, was a lawful thing. It was, moreover, a *private* level crossing, not crossing a turnpike or statute labour road, or other highway, and therefore all the provisions contained in the Railway Clauses Consolidation Act (assuming that Act to be applicable to this railway in reference to level crossings over public roads) have no bearing on this case. In the General Railway Clauses Act there is no provision, so far as the Sheriff can see, in regard to private level crossings.

The general principle of law is here, however, applicable, that the defenders must conduct their business with reasonable care and caution. Such is the rule of the common law; and there is no reason why it should not be enforced against a railway company, although the company has been incorporated and authorised to conduct its business by Act of Parliament. The difficulty is to apply the general principle to the special facts that are here proved.

(1.) In regard to the absence of a watchman, it is proved that there was none, and the Sheriff is of opinion that there was no duty on the defenders to have a watchman at this crossing. It was decided in the case *Stubley v. L. and N. W. Ry. Co.*, L. R. 1, Ex. 13, that a level crossing over a public highway need not be guarded by a watchman, and it would seem to be unreasonable to require this in reference to a *private* level crossing made for the convenience of the adjacent proprietor, who had agreed to take a level crossing instead of a bridge.

(2.) It is said that neither the engine-driver nor the fireman kept a look-out. If this were proved there would certainly be a fault inferring liability in damages. It could not be said in such circumstances that reasonable care and caution had been used in conducting the train. But the Sheriff holds that this has not been proved. On the contrary, it has been proved that both the engine-driver and fireman were at their posts, and were keeping a look-out, although from the height at which they stood they were unable to see the small child at the time when they approached the crossing.

(3.) It is proved that the engine was not slowed as it came up to the crossing, and it never is. It appears from the evidence that there are no less than four level crossings on this railway between Langbank and Port-Glasgow, and wonderful it is that accidents do not happen every day in consequence. On the most frequented line in all Scotland, several trains go at express speed notwithstanding that there are all these level crossings. Some day it may happen that a horse and cart are on the middle of the line when an express train is coming up, in which case there would not be merely considerable damage to the horse and cart, but also to the unfortunate passengers in the train who could take no precautions for their own safety. At the same time the Sheriff can find no authority requiring a railway company to slow their trains upon approaching a private level crossing. By the 41st sec. of the Railway Clauses Consolidation Act it is enacted "that where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater speed than four miles an hour." The absence of any provision in regard to private level crossings indicates that the speed of the trains need not be slackened on approaching them.

(4.) It is in the next place said that the driver of the engine did not whistle in approaching the crossing, and the Sheriff has found this to be proved. There is some conflict of evidence on the point, but it is unnecessary

to analyse it, as the Sheriff has come to the opinion on the law that the absence of this warning did not amount to fault rendering the defenders liable in damages. It is with some hesitation and doubt that he has arrived at this conclusion, but he cannot find authority for holding that a railway company is guilty of negligence because the whistle of the engine is not sounded in approaching every private level crossing. To cross a railway level is always attended with danger, and persons doing so are bound to use all reasonable precaution that the circumstances admit of, by looking up and down the line for approaching trains, and are not entitled to rely upon the drivers of engines giving them warning of their approach. In the present case an engine could be seen from the railway crossing to the extent of upwards of 300 yards. There was no bridge erected by the defenders to intercept the view, a circumstance which existed in the case of *Bilbe v. London Brighton Company*, 34 L.J.C. 183, upon which the judgment of the Court in that case turned, as explained by the Judges in the subsequent case of *Cliff v. the Midland Railway Company*, 2d February, 1870, 23 L.T., New Series, p. 382.

In regard to the alleged duty of the railway company to cause the whistle of the engine to sound in approaching a crossing, opinions of eminent Judges have been expressed, which cannot, however, be regarded as decisive, seeing that in all these cases there was special matter involved. In an American treatise upon torts this doctrine is laid down quite generally, that "a railroad is bound to slacken speed at a turnout, and to give warning when approaching a crossing."—Hilliard on Torts, vol. 2, p. 391. A decision of an American Court is referred to, but as the report of the decision is not to be found in Edinburgh, it has not been ascertained whether the crossing in question had been a crossing over a *public* highway, which would make a material distinction.

In the case of *James v. The Great Western Railway Company*, 2 L.R.C.P., p. 364, the point arose under somewhat special circumstances. "It appeared from the evidence that it was a dark foggy morning at the time of the accident, and the railway was also obscured by smoke from neighbouring spelter works. The plaintiff exercised due caution by looking up and down the line, but did not see the engine for the above reasons. According to the plaintiff's evidence, the engine had no light, and the engine-driver did not whistle or give any notice of his appearance or approach. The jury found a verdict for the plaintiff for £200." A rule *nisi* having been obtained to set aside the verdict on the ground that there was no evidence to go to the jury of negligence on the part of the defenders, the Court discharged the rule "on the ground that the defendants were bound to use reasonable precautions in the working of their line, and that, considering the darkness, it would have been a reasonable precaution to whistle before coming to the crossing, and that therefore there was some evidence to go to the jury of negligence on the part of the defendants." The opinion of the Court will be found at length in the *Law Journal*, vol. 36 C.P., p. 255—note. In this case the Court, dwelling so much as they did upon the foggy night, darkness, etc., seemed to be of opinion that the non-whistling alone would not constitute fault inferring liability in damages.

In the more recent case of *Cliff v. The Midland Railway*, above referred to, there were *obiter dicta* more favourable to the pursuer's plea on this ground. For example, Mr Justice Mellor said, "I quite agree with the

learned counsel for the plaintiff to this extent, that when Parliament authorises a company to construct a railway and to work it, it is implied in that, that the company are to work it in a reasonably proper manner, in the usual way in which railways are worked, and on crossing a footway on a level the company are bound as to the mode of working their railway, as to the rate of speed or signalling or whistling, or other ordinary precautions on the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of that footway." In the same case Mr Justice Lush said, "I need hardly say that I agree with my brother Mellor that in the management of trains upon a line which crosses a way, whether public or private, upon a level, the company are of course bound to use all reasonable care, vigilance, and skill, and the greater the thoroughfare over any part of the line the greater the care and vigilance that ought to be exercised by those who have charge of the trains. Those persons ought to anticipate that people may be crossing when they know people have a right to cross. Whatever the degree of traffic may be, more or less, a corresponding degree of care is required on the part of the company."

In this state of the authorities, the Sheriff is unable to come to the conclusion that there was fault on the part of the defenders in regard to the matter. He adopts the opinion of Lord Chief Justice Erle in the case of *Bilbee v. London and Brighton and South Coast Railway Co.*, above referred to, "I am fully impressed with the necessity of not imposing duties on a railway company beyond what the statute intended." If a Court of Review should come to a different opinion from that now stated, the Sheriff has only to mention that such a decision would be in accordance with his own first impressions.

(5.) The fifth ground of fault alleged against the defenders is rested upon the following standing order of the company. "The Inspectors of Police are responsible that every occupier of a level crossing be furnished with a printed extract from the Acts of Parliament, 8 Vict., cap. 20, sec. 75, and 8 and 9 Vict., cap. 33, sec. 68. Each notice to be cut from the regular notice book produced for the purpose, and full particulars given in the counter-part. Each notice must be served in presence of a witness, and when the gates and fastenings are in perfect order." As has been already pointed out, this absurd rule directs the Inspector of Police to furnish an extract from an Act of Parliament that does not apply to Scotland. The Railway Clauses Consolidation Act further has no application to this railway which was constructed before it passed, which is another absurdity in the rule; and then the two sections of the Act of Parliament referred to are *verbatim* the same; and why both should be furnished to the occupier of a level crossing it is not easy to understand. The 68th section of the Railway Clauses Consolidation Act imposes a penalty upon persons omitting to fasten gates upon the side of the railway, but it has no bearing upon the present case. Supposing the Act to be applicable, all that could be inferred from it is simply that the railway company could not recover the penalty under the 68th section, unless it should be proved that notice of the section had been given. The Sheriff is of opinion that no such notice was necessary; and that neither the section of the Act, nor the standing orders, has any connection with the case.

Act.—Archibald M'Callum.—Alt.—Auld.

English Cases.

CARRIERS BY RAILWAY—*Passengers' Luggage—Special Contract—Foreign Line—Through Ticket.*—Plt. was booked through from London to Paris by defts., who were carriers by their railway from London to Dover. He travelled on their railway to Dover, from thence to Calais by steamboat, and from Calais to Paris by French railway. He registered his luggage at the London station of defts., who thereupon took possession of such luggage. Upon the through ticket which he received from defts. was the following:—"The English railway companies are not responsible for loss or detention of, or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by their trains or boats, and in this latter case only when the passenger complies with the by-laws and regulations of the companies; and in no case for luggage of greater value than £5. Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies, such through booking being only for the convenience of the passengers. Nor will the companies be responsible for the trains or boats being delayed, or not meeting the trains in correspondence, nor for any consequences that may result to a passenger thereby." This ticket was not signed by plt. The luggage was lost upon the French railway—*Held*, in an action brought by plt. to recover damages in respect of such loss, that defts. were protected from responsibility by this special contract, and that they did not lose such protection by reason of its not being signed by plt., the provision to that effect in the Railway and Canal Traffic Act, 1854, only applying to the receiving, forwarding, or delivering of goods upon the line belonging to, or worked by the company making the special contract. *Zunz v. South-Eastern Railway Co.*, 38 L.J. Q.B. 209.

CARRIERS BY RAILWAY—*"Personal luggage"—Child's rocking-horse.*—A child's toy called a spring-horse, standing upon a flat surface about 44 inches in length and weighing 78 lb., is not "personal luggage" within the meaning of regulations allowing passengers by railway to carry 112 lb. of personal luggage free of charge, as the words "personal luggage" apply only to such articles as it is customary for a passenger to take with him on a journey.—*Hudston v. the Midland Rail. Co.*, 38 L.J.Q.B. 213.

NEGLIGENCE—*Carriers by railway.*—Plt., a passenger by defts'. railway, having taken a ticket by a train which stopped at short intervals, not exceeding five minutes each between each station, and having entered a carriage, sat by the door, which flew open and was shut by him between the point of departure and each of the first three stations at which the train stopped. At the third station plt. called for a porter, but the train started too quickly for one to come. Plt. held the door, but getting tired let it go, and it again flew open. He then pulled it with one hand and put his other arm out to fasten the lock, which was on the outside, and put some of his weight on the door while doing so. The door opened and he fell out. It would have taken only two or three minutes to arrive at the next station, and only about five more to finish his journey—*Held*, that there was no evidence to go to the jury of liability on the part of the defts.—*Adams v. the Lancashire and Yorkshire Rail. Co.*, 38 L.J. C.P. 277.

THE

JOURNAL OF JURISPRUDENCE.

THE DIGEST COMMISSION.

THE Commissioners appointed "to inquire into the expediency of a Digest of Law, and the best means of accomplishing that object," have issued their second report. It records the failure of the Commissioners with such remarkable perspicuity and brevity that we give it entire:—

"In our first report we explained the grounds for our opinion that a Digest of Law is expedient; we stated that it would require a considerable expenditure of time and money, and would involve the appointment of a Commission or body for executing the work; but in order to avoid an immediate outlay on a large scale, we recommended that small portions of the Digest, as specimens of the whole work, should, in the first instance, be prepared; and we humbly submitted that powers should be given us to carry this purpose into effect. We were accordingly empowered by your Majesty's Government to take the steps necessary for the preparation, under our superintendence, of some specimens or samples of a Digest such as we had indicated in our report. For this purpose we selected three subjects, namely, Bills of Exchange, Mortgages, and Easements, and we obtained the services of three gentlemen at the bar, each of whom was directed to frame the draft of a Digest of the Law on one of these subjects. The gentlemen, whose assistance we have had, have laid before us materials of considerable value, and have enabled us to form conclusions as to the conduct of the entire work. But we think it inadvisable to continue any further this mode of proceeding. We have found that the examination and revision of these materials with that rigorous care and accuracy which would be requisite before we could lay them before your Majesty as specimens of a Digest of Law, would involve considerable further delay and expense, while on the other hand we have satisfied ourselves that these specimens would have again to be revised, and perhaps recast, when the time arrived for inserting them as portions of a complete and systematic work. The experiment, however, has served an useful purpose. It has brought out very clearly the difficulties to be contended with, and the conditions under which the work must be executed. We believe that the materials which have thus been collected may be made use of with advantage in the formation of a general Digest of the Law, and we are of opinion that the work of a general Digest, based on a comprehensive plan, and with a uniform method, should be at once undertaken.

"A complete Digest cannot be executed without the assistance of the most highly skilled persons whose services can be procured. The success of the work will depend on their efficiency. They must give to the undertaking the whole

of their time and energy. And it is obvious that the services of such persons, and under such conditions, cannot be obtained without the offer of permanent employment and high remuneration. We therefore humbly report to your Majesty our opinion, that it is expedient that a body of persons such as we have described, and not exceeding three in number, should be constituted, to be charged with the duty of executing the Digest as a whole, being provided with the necessary means and assistance, and acting under such directions and control, either of a Committee of your Majesty's Privy Council or otherwise, as to your Majesty shall seem fit."

The Commission was issued at Martinmas, 1866, and truly the preceding report is not much as the result of nearly four years' work. The concluding paragraph is all that is of any value, and as it gives an opinion merely, without argument or facts in its support, the Commissioners might as well have expressed it without so great a delay. The failure of the Commissioners to do more than express a very meagre and a very obvious opinion may be due either to their having selected inefficient men to prepare the specimen digests, from which they expected to gain experience, or to their own want of ordinary foresight. If, when they recommended the preparation of specimen digests, they intended to issue them, without revision, to show the general shape and form of what they meant to recommend, they must have been very unlucky indeed in their selection, if the selected gentlemen were unable to produce work sufficiently accurate for that purpose. Perhaps, after all, good legal work is not to be got by taking in estimates. If, on the other hand, the Commissioners intended that the draft digests should be examined and revised with rigorous care and accuracy before being issued to the public, they showed a wonderful want of knowledge of legal literature if they imagined themselves to be a body at all fit for that work. To revise the digests in that way would require every line of the text, and every letter of the references to be examined (with the minutest accuracy) by men with nearly as much time at their disposal, and possessed of nearly as much knowledge of the special subjects, as the authors themselves. Why that amount of accuracy should be looked for in a specimen digest we are ourselves unable to conceive. In the first report (issued in May, 1867), some idea is given of what the Commissioners anticipated from the preparation of the specimen digests:—

"In the progress of the work, light will be thrown on the question of the best organization of the body to be constituted for the completion of the Digest. A fair estimate will be formed of the time that will be required for the whole. Difficulties, not now foreseen in detail, will doubtless be encountered, and the best way to overcome them will be ascertained. The solution of questions which have already occurred to us will be attained, or at any rate promoted. Some of these questions are the following—what is the best mode of dealing with Statute Law in the Digest?—how should conflicting rules of Law (if any) and doubts which have been authoritatively raised respecting particular cases or doctrines of Law be treated?—and what provision should be made on the important point of the nature and extent of the authority which the Digest should have in the Courts, and how that authority can best be conferred on it?"

On all of these points, the Commissioners have been disappointed.

The Commissioners have not been able to go farther in describing the organisation of the body that should complete the digest than to suggest their number, to say that they should give their whole time to their duties, and to hint that they should be subject to control in some way, "either by a committee of the Privy Council, or otherwise,"—all points sufficiently obvious. They have not been enabled to form an estimate of the time that will be required. They have not ascertained what difficulties they are likely to encounter—at least, if they have, they have not given the public the benefit of their knowledge. They have not been enabled to offer any opinion on the best mode of dealing with the statute law, or with conflicting rules, or with doubts raised by persons in authority. They have found themselves unable to offer an opinion on what should be the nature of the authority to be conferred on the digest, or on the mode in which that authority should be conferred. The Commissioners, therefore, fail to give useful information on any of the points on which they anticipated their ability to pronounce when asking for a grant of funds. They do, indeed, say that they have been "enabled to form conclusions as to the conduct of the entire work," and that the experiment "has brought out very clearly the difficulties to be contended with, and the conditions under which the work must be executed." It may be satisfactory to the trusty and well-beloved gentlemen themselves to be able to say this, but the public cannot be expected to be equally satisfied until they also know what the conclusions are, what the difficulties may be, and what the conditions. How the proposed body of three highly skilled persons is to benefit by the experience of the Commissioners is not explained. All that those skilled persons will receive from the Commissioners will be two reports which will tell them absolutely nothing as to their duties, and three unfinished manuscripts composed by men on whose capacity—until, at all events, their work is published—a slur must rest. A more unfortunate result there never was, and the failure has occurred where failure could never have been anticipated.

Mr Justice Willes, who was added to the Commission after the issue of the first report, dissents from the second report, on the ground that the digest, when made, will, "after all, be only a makeshift for a code, or rather series of codes," and that a code had better be made at once. The opinion that a digest will be inferior to a code is beyond challenge, but as most people agree with the Digest Commissioners in thinking that a digest is an essential preliminary to a code, the ultimate formation of the code will only be retarded if all parties do not acquiesce in the propriety of beginning the task of setting our law in order by forming a systematic digest of the existing rules.

The question is, what is to be done now? It probably will require a few more failures of costly Commissions before the public will be satisfied that law reform, if it is to be good, had better be paid for directly and at once. We therefore do not at present recommend the organisation of a ministry of justice, which should, among its other duties, have that of superintending the formation of the digests,

and of keeping them in order when formed. But it seems clear that we are not yet in a position to institute a working Commission. We want information as to the practicability of forming the digests within a reasonable time, and at a reasonable cost, as well as information on the points which the Commissioners themselves suggested. It is very well to say that a Commission with absolute powers should be formed, but to do that without laying down what precisely they were wanted to do, would be to run the risk of another costly failure. What Government should do, would be to select some qualified barrister whose time is not occupied in practice, and employ him to examine into the matter, and to report on the order which the digest should follow, the method in which it should be done, and the probable cost in time and money of the machinery for doing it. In regard to the order of the digest, it should be an instruction to the reporter to keep in view that it would be desirable, if it could be done without disadvantage to the law of England, to adopt such an order as would be suitable also for the law of Scotland. To get this report would require from six to twelve months more, but if any man of ability were to be induced to devote himself to it for that time, we should get so much information, and probably elucidate so many principles useful for our ulterior guidance, that we should save greatly in the end, and, at any rate, be able to proceed with more confidence than by taking the Commissioners' recommended leap in the dark.

THE EDUCATION OF LAW AGENTS.

[COMMUNICATED.]

THE state of legal education in Scotland is such, that it must soon demand the attention of the profession or the public. We make no reference, of course, to the education which qualifies for the bar. The grievance which we propose to notice is chiefly in connection with the education of the practitioners in the inferior Courts of law. This, always an important question, is particularly so at a time when the method of administering the law itself is undergoing such severe sifting; because, it must be evident that the perfection of administration must depend, to a very considerable extent, on the qualifications of the administrators. The qualifications of our solicitors are so multiform that, to know the varied acquirements demanded by the numerous legal bodies in the capital and provinces, is no mean accomplishment. We have in Edinburgh alone, *three* bodies of solicitors, each examining candidates according to its own lights, and judging them by its own standards. In the provinces, again, we find at least three corporations doing the same kind of work after the same fashion. In addition to this, we have recently been favoured with the advent of a Board of Examiners that takes special superintendence of the education of *all others* who would be solicitors. To this Board and its work we crave

attention. It is composed of representative members of the profession from different parts of the country; and its province is to examine all candidates for admission as procurators into any of the bodies represented. It was constituted about five years ago, in virtue of powers contained in an Act of Parliament. This Act respected vested interests, to the extent of allowing all who were serving, or had served, apprenticeships prior to its date, to become procurators without passing any examination in general knowledge. Such a provision—tardily conceded—seems to have been highly expedient, considering with what facility a man could have become a procurator under the old system. The method of making procurators in those days was this:—A man had a son, aged fourteen or so, whom he put into an office to keep him out of mischief—just as younger ones are, in some cases, sent to school—or may be to earn two shillings and sixpence weekly to assist in plenshing the family exchequer. If the boy thought proper to remain for three years in the country lawyer's office, he had thereby acquired a *right* to become a procurator whenever the spirit moved him. He exercised his right by petitioning the Sheriff of a county for admission. The Sheriff remitted him to examiners—members of the local bar—that his knowledge of *law* might be tested. This was often done by the easy and elegant, though indirect, test of what was the quality of the candidate's wine. We are quite serious: this was too often the case. The liquor duly mingled with the law—as only lawyers can mingle such non-assimilative elements—was almost invariably found satisfactory; and the candidate became thenceforth a member of the legal profession. In the majority of cases the man thus made a member of a *learned* profession had never been, except perhaps accidentally, within the walls of a college class-room; and had never, perhaps, seen a higher legal authority than the rich grocer who had been made a J.P. yesterday. If he had the good fortune to have served his apprenticeship in the county town, he would have an opportunity of seeing the resident Sheriff at least once a week. It is probable that in the latter case he may have been blessed with an occasional glimpse of the great Sheriff-principal himself. In spite of such a system excellent men were not unfrequently admitted into the profession. But it was essentially mischievous, and hence the Act to which we have referred. The result is, for the future, that a high standard of education, both legal and general, is to be maintained. And what is of still more importance, no man can in future become a solicitor *by accident*. The candidate must possess a liberal education prior to his commencing an apprenticeship. He must serve an apprenticeship of four years; at the end of each he is examined to test his progress in his studies; and finally on the expiry of his apprenticeship he must give evidence of very considerable legal and general culture. In addition to this he must have attended the classes of Scots Law and Conveyancing at a Scottish University.

This is so far good; but what of the men who began their appren-

ticeship prior to the passing of the Act? To them the Act, as administered, is a great grievance. The examiners are apparently determined that none but men of the most thorough capacity shall become procurators. The result is that *good* men are rejected and only *first-class* men admitted. In proof of this, at the last examination 54 per cent. of the candidates were rejected; and we have known as glaring, if not more glaring, results. How is this to be accounted for? Because the candidates are inferior men? It cannot be so, since some of the most distinguished law students at our universities have now and then been rejected. That the examiners are inclined to a policy of exclusion? Their high character in the profession, and the *cui bono*, alike preclude that view. That they (the examiners) are not *competent* examiners? [By *competent*, we do not mean competent in legal knowledge. All of them are much above the average in that respect. What we mean is, that kind of competence which is equivalent to *special* aptitude for properly discharging the duty of examiners.] We are sorry to have to say—that is it. The style of their questions shows this. It is not unusual for them to ask a candidate such questions as:—What are the provisions of—well—some obscure Act of Parliament passed, say in 1610?—or, What is the meaning of the maxim—*cessante ratione, cessat lex ipsa*—and how far is it modified in our law? This, we venture to say, is the *reductio ad absurdum* of legal examinations. Is there, with all deference, a Judge on the bench of the Sheriff Court who could answer questions so framed? No sane man would profess to know our statute law if questioned in this manner. This is the true *key* to the failure of so many. Law is, if anything, a reasoned system of doctrine; not a conglomeration of facts, dates, and *irrelevant* maxims.

The remedy we have to propose for the evil—and it is an evil, and a serious one, that men of *average* attainments cannot gain admission to their profession—is, that two or three professors of law should be conjoined with the examiners, at the expense of the candidates. Such assessors are continually in the habit of conducting examinations, the candidates are accustomed to their *method*, and the result would be, that knowledge should be properly tested, for under the present system such is not the case. As a proof at once that professors can examine properly, and that their students are not ignorant of what they are supposed to learn in the law classes, let us cite the results of the competitive examinations, in a law class, in the University of Edinburgh. Take the conveyancing class. In it the standard of second class honours is as high as 75 per cent. of the maximum number of marks. The result is that about 20 per cent. of the class attain that standard: and that about 90 per cent. attain a percentage of between 55 and upwards. These examinations are *purposely* severe, because the object is to determine superiority, not to ascertain *capacity*. Well, we should say, judging from University Degree examinations, that every man who should take 50 per cent. at a professional examination,

ought to pass. But we find that 54 per cent. of the men, of whom 90 per cent. can take 60 per cent. and upwards at examinations that ought to be much more severe, are rejected by the General Council of Procurators. Surely there must be something wrong here, and the remedy which we propose is, at once, the most available and just to all parties.

But there is a wider and more important question underlying all this. The result of the "old system" is, that "raw lads," devoid of training, are continually pouring into our law class-rooms. It is creditable to them, that, in such circumstances, they learn so aptly. The wonder is, that they should comprehend law at all. Many, too many of them, do *not* comprehend it in its grand scientific bearings on human welfare. They become tradesmen, not artists; such men are a burden unto themselves, and a danger to the public. The preliminary *training* proposed by the new Act is not real, because it is to be tested by the local bodies of procurators. This will, if human nature continues as it is, (an extremely probable thing for some years yet at any rate) degenerate into the same kind of thing as the examinations that used to exist. And raw lads will pour in to all eternity. What then is the remedy for this? It is very simple. Let us have a preliminary examination in law, as we have in medicine. Let no person be admitted into a law class-room, except as an *amateur* student, until he has passed this examination, and got himself registered as a student of law. The subjects of examination may fairly form matter for discussion; but we think that a competent knowledge of Arithmetic, English, History, Logic, Moral Philosophy, and Latin, ought to be demanded. We purposely exclude Mathematics, because we consider that an apprenticeship to a practising lawyer is quite sufficient to produce that exactness, and capacity to determine the value of evidence which, so far as a lawyer is concerned, is the only practical importance of that science. Logic supplies better than the Mathematics, whatever else is to be desiderated in training of that kind. But we expect that some person will ask us what is the value of moral philosophy to a lawyer? We do not demand that every lawyer should be able to determine the relations between ethics and law. But, besides the fact that every gentleman should know moral philosophy, it is of primary importance that a man should have a competent knowledge of some system of reasoned truth, before he begins to study a science that is constructed by such subtleties of reasoning, and expressed in such wide abstractions as the massive system of our municipal law. We feel certain that the result of the plan we have indicated would be the elevation of the profession and the diminution of pettifogging litigation. Because litigation is too often the result of the absence of that high professional tone which is the result of high culture—and of ignorance, which is as much the absence of general as of special training. We have seen ruinous litigations occasionally result not from the quarrels of parties but of their solicitors. But more frequently we have seen the quarrels of parties amicably adjusted by their agents. Increase the education of solicitors, and increased confidence and power to prevent evil will necessarily follow.

OPINIONS AND ANSWERS TO QUERIES.

I.—An action was brought in a Sheriff's Ordinary Court in which the summons concluded for £2 odds, for the inlying expenses, and funeral expenses, of an illegitimate child who had died ten days after birth. The defender, on record, denied the paternity, offering, however, subject to that denial, to pay the sum sued for. The pursuer, insisting on proving her libel, was allowed to do so, and obtained a decree for the sum sued for and full expenses, which was affirmed by the Sheriff on appeal. Can the defender appeal to the Court of Session, and is the judgment according to law?—C. B.

It has not been authoritatively decided whether the offer to pay aliment of an illegitimate child, while denying the paternity, affects the pursuer's right to sue or to proceed with her proof. In some Sheriff Courts, a pursuer in such a case is allowed to proceed to prove her libel, and to recover expenses, being held entitled to have the question of paternity settled before her evidence is lost or impaired by the lapse of time. The reasons for this practice are very fully stated in a judgment of Sheriff Barclay, reported above, vol. xii., p. 435. But the question has not arisen for the determination of the Supreme Court. In *Mackenzie v. Smith*, Dec. 23, 1826, 5 S. 189, payment of money to a woman in consideration of receiving a formal withdrawal of a charge of being the father of her child, was held almost alone to be a *semiplena probatio*. In *Keay v. Watson*, Feb. 19, 1825, 3 S. 561, a man who denied the paternity, but had agreed to pay aliment, was held not entitled to the custody of a natural child; but the opinions show that the general law as to the custody of such children was then apparently less firmly settled than it is now. If Sheriffs take the short and, as it seems to us, the correct way of proceeding which seems to be authorised by these cases, and if the offer to pay aliment, along with the pursuer's oath, be held sufficient evidence of paternity, the question will be set at rest for ever.

It must be allowed that many of the reasons assigned for the practice in question are inapplicable when the child has died. But even if the Sheriffs have erred in law, there is no appeal in the case which is put. It is suggested that expenses should not have been allowed, seeing that the action might have been brought in the Small Debt Court. We entirely concur in this view, and think it a very strong, not to say wrong measure, to allow full expenses in such a case. But the 36th section of the Small Debt Act may be read as leaving this matter entirely in the discretion of the Sheriff; and, if so, there is no help for it. Our reading of that section, indeed, is that it is not lawful for the Sheriff to allow expenses in such a case beyond the amount of Small Debt Court expenses; (Dwarris on *Statutes*, 604); but another construction is possible and received in practice; and as an appeal in this case is incompetent, this error cannot be rectified.

The proposition that the value of a cause is to be determined by looking at the conclusions of the summons can hardly be said to have received modification in *Mitchell v. Murray*, March 10, 1855, 17 D. 682, where the rule was laid down that where interest is concluded for and is found due by the Sheriff to the effect of raising the sum in the decree above £25, advocacy was competent. In the recent case of *Purves v. Brock*, July 9, 1867, 5 Macph. 1004, it was held that the value of an article sought to be recovered by a summary petition is not conclusively fixed by the price that has been paid for it as stated on the record, because it may be of greater value to the owner seeking delivery, and that the party objecting that a cause is under the value of £25, must prove it from the pleadings alone. So it is here contended that the "value" of a filiation case is not to be fixed by the pecuniary conclusions, seeing that it always involves character, or, as it is often put, *status*. But many actions which unquestionably fall under s. 22 of the Act of 1853 involve *character*. Moreover, actions as to *status* are incompetent in the Sheriff Court, and it cannot be said with any propriety that actions of filiation involve *status*. Whether in a case such as this, where the child had died and the alleged father offered payment of the sums claimed, the mother had any legitimate interest to pursue the action further, may be doubtful, but it was a proper question for the Sheriff's judgment. What the pursuer wanted was decree for a sum of £2 odds. The Sheriffs were entitled to judge upon the question whether or not she should get that decree and expenses of proving her case in the face of a tender, and even if they erred there is no appeal, and the correct rule can only be authoritatively settled in an action where the money at stake is above £25. The word "value" in the statute must be taken to mean value in money ("the value of twenty-five pounds sterling"), and no *dictum* or decision gives the least ground for attributing to it any other meaning. Injury to character may be estimated in money indeed, but we know of no form of process in which such a valuation is competent save an action of damages.

II.—Is a marriage celebrated on deathbed effectual to legitimate children previously born of the spouses, so as to cut out the person who would otherwise have succeeded to the father as heir in heritage?—A.M.

The case in which there are children of an intervening marriage must now be considered as settled in their favour (*Kerr v. Martin*, March 6, 1840, 2 D. 772), and it is assumed that the question here is with a collateral kinsman.

Legitimation, *per subsequens matrimonium*, is not regarded by the law as depending in any degree on the will of the parties contracting the marriage (*Ersk.* i. 6, 52; *Fraser* P. & D. Rel. ii. 16, Par. and Ch. 35). The latter says, "The legitimation of previous offspring is not a matter for which parents can stipulate, or which may be given or withheld according to their supposed purposes or

understanding. It is, on the contrary, the gift or legal result of the law, as applicable to facts and circumstances." And this principle, founded on the words of the Roman jurists, and confirmed by the decretal of Pope Alexander, so often referred to in discussions on this subject,* is the doctrine which, till the present century, prevailed in every country where legitimation is admitted. The succession, therefore, which springs from it is not properly speaking derived from the will of the ancestor, but from the disposition of the law. The reduction *ex capite lecti* is not intended to overthrow, but to support the succession of the legal heir: and in the present case, the legal heir is the first-born of the children legitimated by the marriage on deathbed. It is not imagined that the person excluded by the legitimated offspring will endeavour to cut down the marriage, and it is thought that the latter being in the eye of the law apparent heir, the person excluded will not have any title to pursue a reduction on the ground of deathbed; nor will there be any known form of action by which the succession of the apparent heir can be assailed on this ground. The principle of legitimation above referred to is well expressed by a learned judge in *Rose v. Ross*, 1830, 5 S. 605; 4 W. and S. App. 68, Lord Craigie says, "The right of legitimacy which follows from marriage, by the law of all the countries in Europe except England, is not a personal privilege in the proper sense of the word. It arises from the general law; it operates not only upon the status of the persons legitimated, but on the rights of their parents and relatives, and for them as well as against them."

Besides these general considerations, a multitude of minor and collateral arguments tend to the same conclusion.

1. The absence of discussion on the question in our writers; and the omission of this case in their anxious enumeration of the deeds struck at by the law of deathbed. The question as to the validity of the marriage itself, when contracted *in articulo mortis*, is discussed by civilians and canonists, and in France such marriages were by positive enactment in the seventeenth century deprived of all civil effect. "The new legislation of that country has not thus shut the door to repentance" (Allemand, *Traité du Mariage*, t. ii., p. 41; Locré *Législation*, t. vi., p. 260). The controversy was carried on with vigour on the Continent for two centuries, until in most countries it was set at rest by legislation; and it would probably have been imported into Scotland, if any doubt had been supposed to exist.

2. The analogy of other cases in which the legal order of succession is affected by the act of the ancestor, and yet by an act which is not capable of reduction as a writing granted under the same circumstances would be. Treason committed on deathbed forfeits the succession, for the act of treason is merely, like the marriage in the present case, the occasion on which the law operates a diversion, and

* *Tanta est vis matrimonii ut qui antea sunt geniti post contractum matrimonii legitimi habeantur.* See *Munro v. Munro*, 15th Nov., 1837; rev. August 10, 1840, 1 Rob. Ap. 492.

is not reducible by the heir *alioquin successurus*, either in itself or in its effects (Dirleton, *In lecto*, p. 181). So, too, a minor can claim restitution against any alienation of heritage which he has made in minority by any writing under his hand. But he cannot be restored against a marriage, though it should be with a prostitute; and his heritable succession may be effectually altered by such a marriage, while a settlement under his hand would be null.

3. The analogy of the case of *Crauford's Trs. v. Hart*, Jan. 20, 1802 (M. 12698), appears to be in point. There it was found that a widow, whose husband had survived the marriage only ten months, but who had borne him children before the marriage, by which they were legitimated, was entitled to the legal provisions of a widow just as if these children had been born during the marriage. This shows how the law regards legitimated children as in all respects on the same footing as those born legitimate of the same marriage; and at the same time affords an instance of a rule operating in the same way as deathbed does, for the protection of particular interests by the appointment of an arbitrary space of time, being overborne by the legal effects of marriage.

The opinion adopted seems to be supported by the best authorities of our own law. Craig (ii. 12, 27) gives no opinion exactly in point; but his citation of the case of the Master of Sempill, though the existence of that case has been shown by Mr Riddell (Tracts, Historical and Legal, p. 155) to be more than doubtful, proves at least that the fact of the marriage being on deathbed was considered no objection to the succession of the legitimated children. Stair does not notice legitimation, but the style of the summons of bastardy which he gives (iv. 12, 7) may be referred to for the generality of its terms. See also Mackenzie on *Precedency*, Works, ii. 561. Bankton (i. 5, 57) says, "Law has prescribed no time certain preceding one's death for solemnizing marriage, and therefore marriage may be solemnized at the point of either party's death or the last minutes of their life, if they still have their senses, *especially in order to legitimate children procreated between them.*" Mr Fraser leaves the question open. See on the affirmative side Shaw's Bell's Commentaries, 1061, (there is nothing to be found in the fifth edition of Bell's Commentaries, or in the Principles); More's Notes, p. 33 and 318; Skene, *N. ad. Reg. Mag.*, 2, 51, 2. Finally, reference may be made to a passage in the opinion of the Lords J. C. Boyle Glenlee, Meadowbank, Medwyn, and Moncreiff, in *Kerr v. Martin*, *cit.*, where legitimation by a marriage *in articulo mortis* is stated as an undoubted principle, though it is referred to the fiction of retroaction, which was exploded by the judgment in that case; and to that of *Shedden v. Patrick* (May 9, 1854, 1 Macqueen, 535), in which all conceivable arguments were brought forward against the legitimacy of children whose parents married within a week of the father's death, and the argument from deathbed was never suggested.

The only authorities in the law of Scotland in favour of the invalidity

to this effect of a marriage on deathbed are Stewart in his *Answers to Dirleton and Wallace*, Inst. B. v., t. 2, p. 272. The latter argues that the doctrine is inconsistent with the law of deathbed, because the person who is heir at the moment when the ancestor ceases to be in *liege poustie*, then acquires a right sufficient to defeat the claims of legitimated children; nay, that the law will not support the validity of the marriage itself. These writers must weigh but little against the mass of authority and principle which is arrayed on the other side.

The impending abolition of the law of deathbed may perhaps make this question one of merely antiquarian interest, but those who are interested in the subject may refer to Bockleman, *Com. ad. Pand.* t. 1, p. 50; Boshmer, *Jus. Eccl. Prot.* iv. 3, 53 (who holds marriage by one *ægrotante* to be null unless there be hope of recovery); Cocceius, *de Matrim. Morn.*, Opp. (ed. 1722) t. ii., p. 543, and *de Privileg. Patris*, vol. i., p. 1020 (who holds that a sane father marrying *in articulo mortis* legitimates the children previously born of his wife because he *may* recover); Voet. *ad Pand.* xxv. 7, 11; Zoesius *Com. in Pand.* xxv. 7, 12; Perez, *Prael. in Cod.*, v. 27, 14 (vol. i., p. 398, ed. Elsevir); Sanchez, *de Sanct. Matr. Sacr.*, l. vii., disp. 105 (where there is a very ample discussion of the whole subject, and *inter alia* of the question whether a child, legitimated by such a marriage, of a parent who is institute in a certain succession excludes a person substituted to him, in the event of his dying without legitimate issue—which the author answers in the affirmative, even where the marriage is contracted “*eo animo defraudandi substituti*”); Covarruvias, *de Matr.*, P. ii., c. viii., s. 2, art. 10 sq.

III.—A litigant is successful in regard to all the conclusions of his action, but the Sheriff allows him no expenses. Can he appeal to the Court of Session?—LEGULEIUS.

Undoubtedly he can. The point was taken for granted in the cases of *Mutrie v. Haldane's Trs.*, May 23, 1844; and *Robertson v. Wilson*, March 3, 1857, 19 D. 594. But observe that under s. 69 of Mr Gordon's Act, and contrary to the rule established in *Mutrie v. Haldane's Trs.*, the appeal will enable the opposite party to contend that the Sheriff has gone wrong as to the merits as well as in regard to expenses.

NOTES IN THE INNER HOUSE.

OF THE COMPUTATION OF LEGITIM AND JUS RELICTAE, AND INTEREST THEREON.

Earl of Dalhousie v. Crokat, March 26, 1868, 6 *Macph.* 665.

THIS case, though not now a recent one, clears up a point of some importance which is left a little obscure by Mr M'Laren in his excellent work on succession, published before its decision could possibly have been noted, and as to which some expressions in reports and digests

create uncertainty. "The division," he says, "of the father's estate falls to be made according to its condition and *amount* at the time of his death, irrespective of any change in the character of the succession consequent upon the acts of his executors or trustees," (vol. i., p. 119).

The author appears, from the form of expression, to have mainly in view in the text acts of administration changing the quality of the estate as heritable or moveable. But his cases go further, as he shows elsewhere, and fix the rule that the division is governed by the state of matters at the death of the father, so that not merely the trustees but the children are unable to alter, by any subsequent act, the rules of division. They may, indeed, elect to take their legal rights or their testamentary provisions, but in either case the father's death is looked to as the critical moment. Not only is the division tripartite or bipartite, according as there are then widow and children or only a widow or children; but *Fisher v. Dixon* may be referred to as showing that the number of shares into which legitimi divides is fixed then, and is not affected by an election on the part of some of the children to accept testamentary provisions. Whether the succession is entirely governed by the legal rules or partly by the legal rules and partly by will, the shares of legitimi remain the same, and the only effect of a child's acceptance of a testamentary provision is to throw his share of legitimi into the residue or share of the general donee. Further than this the cases referred to by Mr McLaren do not go. They do not fix that in calculating the sums to be paid in name of *legitimi* and *jus relictæ* the *value* of the estate and of its constituent parts is to be estimated as it stands at the death of the father, for in none of these cases did questions of that kind arise.

Mr McLaren says, "The sworn valuation made for the purpose of settling the inventory duty is the proper datum for fixing the value of the succession," and he refers to *Breadalbane's Trustees v. Duchess of Buckingham*, 26th May, 1842, 4 D. 1259-1264. The same case is referred to by Mr Fraser in support of a similar proposition. But no such law is to be found in the report either in Dunlop or in the Jurist. Nor are we acquainted with any other case which ascribes to the inventory, given up on confirmation, so extensive an operation. In accounting with a widow for *jus relictæ* or a child for legitimi, the liability of executors or trustees is not, we imagine, to be measured by it, and we doubt if that liability often is so regulated in practice. In many cases the actual value of the estate as realised will be considerably more or less than the inventory, and it is quite clear, as we shall immediately see, that the liability of the executor is to pay the third or the half of the actual value of the estate as realised, not that proportion of it as appraised for the purposes of confirmation.

The same author proceeds to say, "Where payment is deferred, whether in consequence of the dependence of legal proceedings or otherwise, interest is due from the date of the father's death, and payment cannot be resisted, or the rate of interest restricted on the ground of *mora* or lapse of time." In *Sime v. Balfour*, 1804,

M. Her. and Mov. App. 3, a daughter was allowed interest on her legitim against her brother's representatives from her father's death in 1777, under deduction of a reasonable sum for board and maintenance while she lived in family with her brother. The case having been appealed and remitted (5 Pat. 525) no final decision was pronounced, except that the pursuer, Miss Sime, was entitled to legitim, till 1833 (*Minto v. Kirkpatrick*, May 23, 1833, 11 S. 632). The Court then adhered to the interlocutor of Lord Medwyn, repeating the finding as to interest in the judgment of 1803. It is evident that no doubt was ever entertained that legal interest was due from the father's death, the real contention having been about other questions. In *Hardie v. Kay's Trustees*, Feb. 12, 1823, F. C. and 2 S. 213, the point decided was that the executor of a predeceasing wife was entitled to the wife's share of the goods in communion with the interest actually drawn by the husband from her death, although no demand had been made for the wife's share until after his death. In these and other cases the death of the person whose succession is in question is taken as the *punctum temporis* at which payment is held to have been due, and from which interest is payable. The question arose with regard to rights claimed long after they had opened to the claimants, and after the estates from which they were due had been dealt with by the defenders, in one case a son, in the other a husband, as entirely their own. These cases therefore were not the same as that of an executor or trustee managing an estate for the beneficiaries, and against whom a claim for legitim or *jus relictæ* is made. The proportion of the estate payable in virtue of such a claim, and the deductions for debts, including marriage-contract provisions, expenses of administration, etc., having been fixed, at what date are we to take the value of the estate, and from what date is interest payable? The answer to this question appears to be given by the case of *M'Intyre v. M'Intyre's Trs.*, July 9, 1865, 3 Macph. 1074, and more fully by that now before us. In Lord Cowan's judgment in that case, which was concurred in, the widow's right to interest on her *jus relictæ* from the date of the husband's death is recognized, subject to this limitation: "It may be that some of the property is not yielding interest or capable of being realized till some time after the husband's death, in which case a claim for interest made by the widow may be met on that special ground; but if the funds are yielding interest it is just her estate that is yielding interest, and no one else is entitled to it." Similar limitations are also admitted in the class of cases previously referred to: See *Menzies v. Livingston*, July 5, 1838, 16 S. 1268, Feb. 27, 1839, 1 D.; *Smith v. Barlas*, Jan. 15, 1857, 19 D. 267.

In the case before us Lord Dalhousie claimed as legitim one half of his father's executry as at the time of his death, and was found entitled to it. In the accounting which followed in order to ascertain the amount of the legitim, one of various questions raised was whether a sum of £2000 lost in the hands of Mr Blaikie, agent for the executor, was to be deducted in ascertaining the free residue. The

judgment of the Court was that as that sum had been lost after it had been realised, the executor was responsible for it, i.e., it was lost to him and was not to be deducted in estimating the amount of the free executry. The nature of the question required a complete exposition of the nature of a child's claim for legitim, which is not a right to the funds composing the executry itself, but a *jus crediti* against the executor, "to the effect of making him liable to account for certain proportions of the realised produce. . . . The amount of a child's claim depends on the amount of executry estate that may be realised by the executor, by the use of due diligence; and if bad debts or losses occur before the estate, with due diligence on the part of the executor, could be realised, the legitim is so far diminished. . . . A large surplus beyond what is necessary to pay debts has been realised, and one half of whatever may be the free surplus is due by the executor in name of legitim to Lord Dalhousie. It is also true that, as regards legitim, the term of payment is not a definite point of time, and depends on the date when the estate is realised; but on that event taking place, the executor is no more entitled to retain the money in his own hands from the children than from other creditors. "Holding these principles to be clear, the peculiar fact here is, that the executry funds were realised to a considerably greater amount than was necessary for payment of debts and the expenses of recovery; and therefore one half of that surplus was due to Lord Dalhousie in name of legitim, and due to him as a creditor." Per Lord Curriehill, 6 Macph. 666. And the judgment therefore is that as the sum in dispute was lost after realisation, and after it ought to have been paid over to the pursuer, it was lost to the executor, and that altogether apart from the question whether there was negligence on the part of the executor in thus having the funds in the hands of his own agent. Lord Deas speaks to the same effect: "Legitim is a certain proportion of the personal estate left by the deceased, and that estate, I apprehend, must be held to consist not of the amount as estimated at the date of the deceased's death, but the actual amount which has been or ought to have been realised by the executor." His lordship thus quite agreed with Lord Curriehill as to this principle, though he differed as to the result, being of opinion that a balance brought out against Mr Blaikie by means of objections taken to his accounts, could not be held to have formed part of Lord Panmure's estate realised by his executor. Lord Ardmillan gives an opinion substantially coinciding with Lord Curriehill's, and points out that as a child is not entitled to profits made with executry funds after realisation (*M'Murray v. M'Murray's Trustees*, July 17, 1852, 14 D. 1048), it naturally follows that he cannot be made to suffer any loss arising after realisation. The Lord President concurs with the majority, on the simple ground that the money was realised and was lost by being improperly left in the agent's hands.

The result to which we are thus led is that generalized by Mr Fraser from the cases already referred to, and stated with even more than his usual clearness in the following passage:—

"The exact amount of the legal provisions may be uncertain for a long time after the husband's death, on account of questions as to the solvency of debtors to the estate, or contested claims in its favour or against it, which may possibly issue in there being no free executry at all, to which any such claims can attach, or a very large or very small amount, according to circumstances. In the same way, the number of claimants entitled to take a share, and of course the amount of each such share, may remain uncertain long after the death, depending upon questions as to there being or not being an effectual renunciation by some of the children, a complete forisfamiliation as to others, or even as to the legal right of the person claiming *jus relictæ* to the character of a widow (per L. Jeffrey in *Fisher v. Dixon*, June 16, 1840). It has accordingly been decided, that where it can be shown that the widow or children had allowed the property to be managed for them by the husband's trustees, they could claim its value up to the time they demand it; and where its existence is contingent and uncertain at the husband's death they can claim it according to its condition when realized (*Ross v. Masson*, February 3, 1843, 5 D. 483). If there be any delay in paying the *jus relictæ* or legitim, or predeceasing wife's share, the widow and children are entitled to interest from the father's death to the day of payment against the husband's trustees who may have improperly withheld the money; and although the interest be claimed for a considerable number of years, the long lapse of time will afford no plea of favour for the reduction of the interest; if the parties against whom it is demanded do not show that they communicated to the widow and children the rights they were entitled to at law, (*Sime v. Balfour*, M. App., Her. & Mov., 3, 1804; *Hardie v. Kay's Trs.*, February 12, 1823; *Menzies v. Livingston*, July 5, 1838; *Minto v. Kirkpatrick*, May 23, 1833; *Lawson v. Lawson*, M. App., Legitim, 1 (1777)." Fraser, *Pers. & Dom. Rel.* i. 535).

Add this, that the widow and children will be entitled only to the interest actually recovered if it be less than bank interest, until the time when the subjects have been realised, or, on a reasonable view of the circumstances, ought to have been realised.

Reviews.

Commentaries on the Law of Scotland, and on the Principles of Mercantile Jurisprudence. By GEORGE JOSEPH BELL, Esq., Advocate, Professor of the Law of Scotland in the University of Edinburgh. Seventh edition, being a republication of the fifth edition, with additional Notes, adapting the Work to the present state of the Law, and comprising abstracts of the more recent English authorities, illustrative of the Law of Scotland. By JOHN M'LAREN, Esq., Advocate, Sheriff of Chancery. Vol. I.—Division I. Edinburgh: T. & T. Clark, 38 George Street. 1870.

GREAT as the merits were of Mr Shaw's edition of Mr Bell's greatest work, it was never accepted by the profession as a complete substitute for the Commentaries of 1826. Nor could it possibly have been. Mr Shaw made a book which will continue for its own sake to be referred to for some time to come, and which was perhaps superior in method and arrangement to Mr Bell's original work, but which was rightly or wrongly supposed not to distinguish sufficiently between the author's text and editorial additions, and in which, moreover, it was feared that the author's real meaning might be lost in consequence of the innumerable transpositions of his text. These fears may have been unfounded, for we are assured that the text of that edition is entirely and exclusively Mr Bell's, except where the contrary is indicated; but they were quite sufficient to make a new edition, adapting the text of 1826 to the present state of the law not only desirable but inevitable. The legal profession is quite prepared, as we know, to welcome such a new edition, and its reception will be all the more cordial because it is issued under the care of the soundest and most indefatigable of legal authors, Mr John M'Laren. It would be superfluous for us at present to write an article on a work so famous, by an editor so well known and so trusted. It is enough to announce the publication of the first half of the first volume, reserving any fuller criticism that may be necessary until the completion of the work.

It is proper, however, to point out what appear to be the more important characteristics of the present edition. First of all, the text of 1826, the last published under Mr Bell's own eye, is carefully retained, and for purposes of reference the pages of that edition are noted on the margin, somewhat after the fashion of Mr More's edition of Stair, and the recent editions of Kent's Commentaries. This will enable all references to Bell's Commentaries to continue to be made, as they have been made for forty years, to the volume and page of the fifth edition. All the editorial matter, without exception, is enclosed in square brackets, both in the notes and where the new law is of such extent and importance as to make it necessary to insert it in the text. Additions to the text are, however, rare in the portion of the work published, the longest being a view of "the Present State of the Law of Property in Ships," extending from page 159 to page 165, which has only one fault—namely, that the want of headings and paragraphs impedes the reader, and makes reference for any particular point a work of great difficulty. We must beg Mr M'Laren in the future portions of his work to enable his readers to consult his own additions without so much labour as is involved in reading a quarto page divided by only one or two paragraphs. The editor has devoted great pains to the elucidation of the Law of Sale, with regard to which Mr Bell was sometimes obscure or erroneous, and which has undergone considerable alteration since he wrote. The views of Mr Bell and Mr M'Laren on this subject may well form the subject of commentary on some future occasion.

We understand that the editor is at liberty to make use of Mr

Shaw's Commentaries for the purposes of this edition, which will no doubt both facilitate his labours and add to the value of the seventh edition. The typography and paper, and the whole work that falls within the province of the publisher and printer, are all that could be desired, and it is not too much to say that this will probably be the handsomest law book that has ever issued from the Edinburgh press. The publication in parts will be convenient for those who have frequent occasion to refer to such authorities; and with so rapid and punctual a workman as Mr M'Laren, no avoidable delay need be anticipated in the issue of the remainder of the work.

The Month.

Report of the Royal Commission on Law Courts.—A portion of this long-awaited-for document has been published. It is not remarkably interesting or startling, many of the conclusions being such as were clearly foreseen when the composition of the Commission was announced, and others being the inevitable result of the evidence already published. The Commissioners report against the abolition of the Outer House, and against the delegation of any of the work now done by the Judges to clerks or inferior officers, and in favour of increasing the salaries of the Judges, and of giving the Court more power to re-arrange its work. They do not, however, suggest any means for compelling the Court to exercise this power when required, having probably forgotten that the Lord President and Judges may not always be so zealous as, fortunately, they now are. In regard to procedure the report suggests that the power of amendment should be extended to the conclusions of the summons, that a party should be empowered to tender to his adversary a note of admissions as to documents and facts, with certification as to expenses, and a notice to produce documents in place of commission and diligence against parties. Affidavits are also favourably spoken of as a mode of proving matters not seriously disputed; and various other reforms are suggested. Proofs, as well as Jury Trials, ought to be competent at circuit. The Teind Court ought to be merged in the Court of Session.

In regard to the Inferior Courts, very little change is suggested by the majority of the Commission. They adopt rather offensively that favourite hallucination of the Sheriffs, that their mission is to prevent Sheriff-Substitutes from yielding in their judicial duties to the temptations of local prejudices and influences; and boldly assuming that the latter (who are, after all, but inferior beings) would at once become corrupt and partial, but for the existence of their guardian angels in the Parliament House, they assure us with touching eloquence that "so complete, though imperceptible and silent, has been the executive control of the Sheriffs, that the community have forgotten

that there ever was a time when a resident Sheriff was suspected of local partiality." In the matter of jurisdiction no change is desired by the majority in the large class of consistorial actions, except that petitions for the protection of married women's property, under the Conjugal Rights Act, should be presented to the Sheriff. The Commission is in favour of extending the Sheriffs' jurisdiction to all questions of heritable right and title without any limit. Actions against foreigners, declarators, and reductions, and extraordinary removings, are to be competent before the Sheriff, and his judgment is to be final in all cases under £50.

Various sensible suggestions are made in regard to Burgh Courts and Justice of Peace Courts.

In dealing with the question of the salaries of inferior Judges, the Commissioners have, we think, been either unduly afraid of Mr Lowe, or have seen the impossibility of preserving their favourite institution, the Double-Sheriffship, without starving the local Judges. In the scheme which they propose the salaries are not materially increased—we should say not at all increased, when we consider the additional work which the report proposes to give to the Sheriff; and the most material increase is, we think, in those of the principal Sheriffs. We confess we are surprised that the Commission should have gone so far to propitiate Mr Lowe and the present shabby Government.

The most important recommendation which the report contains is modestly put at the end, and is expressed so quietly and almost ambiguously, that it almost looks as if the Commissioners had been afraid to suggest so alarming an innovation. It relates to the privileges of agents.

The Commissioners properly object to double agency, but approve of relaxing the rule laid down by the Court in Brash's case against bargains for dividing fees between Edinburgh and country agents, and of admitting country agents to conduct, in the Supreme Courts, cases appealed from the Inferior Courts. Nay, more, they propose that for the future all exclusive privileges of agents should be abolished, and the same educational test applied to all, with of course a power by each Court to protect itself by excluding improper persons from practising before it. The Commissioners are of opinion

"That there should be one general examination applicable to agents throughout all Scotland; that any one who has passed that examination should be entitled to practise in all the Inferior Courts. As it is essential to the proper conduct of the business of any Court that the Judge have some control of the conduct and character of those who practise in it, any one so qualified, who is desirous of being admitted to practise in any Sheriff Court, should be required to apply for and obtain the sanction of the Sheriff, who should not have power to refuse it on the ground of defective educational qualification.

"If any one is desirous of joining any of the legal corporations, some few of which possess exclusive privileges, he must comply with any further regulations which have been established as conditions of admission.

"Any exclusive privileges possessed by such bodies ought to be abolished.

"They think, also, that any one who has passed the examination above referred to, should be admitted to practise in the Supreme Court, on passing such further

examination in its practice and procedure as may be fixed by the Court, and on being admitted by the Court."

Liability of Agents for Foreign Principals.—In his Commentaries (i. 494), Professor Bell lays down broadly the case where the principal is abroad as one of the exceptions to the general rule "that agents properly authorised, contracting for a known principal, are not personally responsible on such contracts." This was conclusively negatived in *Millar v. Mitchell*, February 17, 1860, 23 D. 833, where it was decided that "an agent in this country contracting for a disclosed foreign principal, does not to any extent, apart from special bargain, guarantee the solvency of the principal. The question is one of evidence in all cases" (Guthrie's *Erskine's Principles*, p. 324). In England the old doctrine has not been so decidedly overturned, and still holds its place in Smith's *Mercantile Law*. It may now, however, since the judgment in a recent case, be held as finally exploded.

The original doctrine is stated in Story on Agency, s. 268, "that agents acting for merchants residing in a foreign country are held personally liable on all contracts made by them for their employers, and this without any distinction, whether they describe themselves in the contract as agents or not." In *Bray v. Kettel*, 1 Allen (Mass.) 80, the Court said, "We are inclined to think that a careful examination of the cases which are cited in support of this supposed rule, will show that this statement is altogether too broad and comprehensive." And later on he adds, "The more reasonable and correct doctrine is that when goods are sold to a domestic agent or a contract is made by him, the fact that he acts for a foreign principal is evidence only that the agent and not the principal is liable. It is in reality, in all cases, a question to whom the credit was in fact given. . . . The fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit, and is liable to be controlled by other facts."

The recent case, in the Court of Exchequer, of *Paice v. Walker*, 22 L.T. Rep. N.S. 547, shows an inclination to place contracts with agents of foreign principals on the same footing as other contracts, and to regard the fact of the principal residing abroad as merely an element in the case—a piece of evidence showing the intention of the parties as to the person to whom credit was intended to be given. There was in that case a sale "to A. J. Paice, Esq., London, about 200 quarters of wheat (as agents for John Schmidt & Co., of Dantzic)," and the sale note was signed "Walkers and Strange" simply. The signing agents are held personally liable, and as only one of the Judges laid stress on the fact of the contract being made on behalf of foreign principals, it may be assumed that such a contract would bind the agent, though the principal were resident in England.

Baron Pigott considered this circumstance material, and that "naturally and reasonably enough the plaintiff would prefer to look to parties living in London, and probably personally known to him, than

to strangers living so far away as at Dantzic." Baron Cleasby, however, reverted to the earlier principle. "The principle, I think," he said, "will be found in all the books treating of the law of principal and agent, that, as a general rule, persons acting for merchants in a foreign country are personally liable on contracts made by them for their employers, unless they expressly exclude such liability on the face of the contract itself, on the presumption that the credit is rather given to the agent or factor at home than to the principal resident abroad." He founded this doctrine on a doctrine of Chief Justice Eyre, who remarked in *De Gaillon v. L'Aigle*, 1 Bos. and Pull. 369: "I am not aware that I have ever concurred in any decision in which it has been held that, if a person describing himself as agent for another residing abroad, enters into a contract here he is not personally liable on the contract."

But the *Law Times* remarks—

"There that learned Judge simply wished to remove the impression that under no circumstances would he hold an agent so contracting personally liable, and we expect that had he more fully expressed his views he would have said that the fact of the principal being a foreigner would be a material piece of evidence to fix personal liability on the agent."

It is really important to consider whether agents in this country are to consider themselves personally liable as a general rule, or to be considered so more easily than agents whose principals are resident here. In the first case, a positive impediment to commerce might arise and litigation be fostered by the novel form of agreements by which agents would endeavour to exclude their liability. It is a plain and sensible doctrine that the English principle where all parties are resident in this country should be taken to apply, but that the fact of a foreigner being the principal should throw the burthen upon the agent to prove that the opposite side knew they were selling to or buying from a foreigner. As a rule, it is far more satisfactory to treat a disclosed principal as the immediate contracting party, and if our view were generally adopted the middle course between extreme opinions would seem to be hit upon, for the Lord Chief Baron in *Paice v. Walker* did not attach "much or any" importance to the fact of the defendants being agents for a foreign firm."

It is important that it should be understood, that in England more weight may perhaps be still attached to the presumption of fact than, since *Millar v. Mitchell*, would be the case in Scotland. We confess we were rather surprised to be thus reminded how great an advance in mercantile law we made by that decision.

The Outer House and the Bar again.—This subject has continued to be the subject of animated discussion. Besides a long and able paper in a legal contemporary, the *Scotsman* has dealt with the subject in a leading article, which we quote. We cannot but express our satisfaction that the newspaper press of Scotland should at last have recognised the duty that lies upon it of dealing in a free spirit with legal and professional subjects. At present, want of space forbids us from commenting on the subject; but we trust that the meditations of the long vacation may lead those who have the power to devise some remedy for a system which is not only injurious to the public, but demoralising to the profession. The suggestions of the *Scotsman* are

well worth trying; if they fail, a much more stringent and radical cure will be necessary, and this we are quite prepared to propose. The article is as follows:—

"The state of matters in the Outer House of the Court of Session, as described in the letter of 'An Agent,' which we published a few days ago, cannot fail to lessen the usefulness and impair the dignity of the Supreme Court. And we are concerned to say that the picture he drew is not at all exaggerated. In the last number of the *Journal of Jurisprudence*, the truth of the 'Agent's' picture is fully admitted. Much work, and that, too, of the most important and pressing kind, is almost at a standstill. There are plenty of cases waiting to be disposed of, both in the procedure roll and in the ordinary debate roll; but nobody comes to argue them or to move in them. For about two at least of the six hours each day allotted to common business, each Lord Ordinary sits, like an unhappy Theseus, in lonely splendour; while the macers call loudly in the Outer House, no man regarding them. It behoves those in authority to find out the cause of this, and remedy them as speedily as need be.

"The powers which the Outer House Judges already have might and ought to be exercised with greater stringency than they at present are. An Act of Sederunt of 1865 has recently been re-enacted which, if rigorously enforced, would do something to cure this mischief. That Act provides that, if neither side attend at the calling of a case, the Judge *shall* put it to the bottom of the roll; and that, if only one side attend, the Judge *may* give judgment in favour of that side. But it is plain that neither remedy is sufficient. The second, owing to the habit which prevails of giving mutual indulgence, is never put in force; the first would do no good if it were put in force. For if every case were put to the bottom of the roll in succession—which, according to the present mode of conducting business, would be the result of enforcing this rule—it is clear that very little effect would be produced on the relative position of the cases so dealt with. The evil lies too deep for these remedies. It arises from the system of mutual indulgence to which we have alluded; and from the want of power on the part of the Lords Ordinary to enforce attendance at their bars. Agents will not allow their counsel to take decree in the absence of the other side, relying on the same indulgence being, on a future occasion, extended to themselves. The Judges are forced to accept excuses for the non-attendance of counsel—often the inventions of ingenious clerks, almost always such as no Judge should be constrained to recognise. Previous to Lord Advocate Gordon's Act, the 'mutual indulgence system' had brought about exactly the same mischief with regard to the lodging of papers. A most salutary provision of that Act declared that no consent of parties should avail to admit of over-due papers being received. But the mischief has now sprung up at another stage. As then parties did not lodge their papers till it was quite convenient, so now they don't debate their cases till it is quite convenient. And the result is that cases stand for weeks and months in the Outer House debate rolls—each time they are called the counsel on one side or another being 'engaged elsewhere.'

"This sort of thing, so far as known, exists at no other bar. It is, we believe, common enough, elsewhere as well as here, for senior counsel to hold briefs in cases which they cannot attend. The client is presumed to get his money's-worth by preventing an eminent counsel being employed against him, and perhaps securing his attendance in a Court of appeal. But the cases are not, on this account, delayed. Some counsel are in attendance. Cases are not left for weeks and months in the Vice-Chancellor's rolls in order that certain counsel may overtake a great number of cases by making them all wait their convenience. No such practice would be tolerated there for a single moment. Nor should it be tolerated here. It is exasperating to litigants, discreditable to the Court, and in the long run will prove hurtful even to those who seem now to profit by it.

"The remedy does not seem hard to find. Exactly the same evil was cured by Lord Advocate Gordon's Bill. Let us apply the remedy of that Bill to the

different circumstances in which the evil has broken out. In other words, let us compel the attendance of counsel just as we have compelled the lodging of papers. Let us force counsel to speak at the proper time, just as we have forced them to write at the proper time. We would not propose anything extravagant—at least to begin with. But would it be too much to give Lords Ordinary the power, having called a case once and no attendance being made, or attendance only on one side, to intimate that on a day then named he would call the case again, and that he would then require attendance? Failing *any* attendance at the second calling, it should be made imperative on him to dismiss the action; failing attendance on one side, it should be made imperative on him to give decree in favour of the other. The requisition of attendance on the second occasion should be peremptory, no excuse whatever being allowed for absence; and the Judge should not only be empowered but required to act as above. If his so acting be made optional, or, still worse, if it be made in any way dependent on action from the bar, the power of the remedy would soon disappear. We cannot say that, to the non-professional mind, there seems anything very hard in such a regulation. Legal etiquette in the matter of money affects the lay intelligence with surprise on many grounds. But that law-suits should be prolonged, litigants harassed, justice delayed, and the whole Court discredited, in order that some half-dozen counsel may absorb all the fees, is really an intolerable extravagance. It may be that, as a result of the above regulation, counsel might have to follow the example of their brethren in England, and confine themselves to particular bars. Or it may be that the rule would be relaxed which at present prevents a counsel being taken in to do some special bit of work in a case. Neither result would be an unbearable calamity. We have no wish to lower the prizes of the profession; very far from it. But the true way to secure for the profession the continuance of any prizes at all is to provide for the conduct of business with reasonable rapidity and according to reasonable rules.

"Reform on this point must come from the Court. No advocate will move in it—fearing the imputation of unworthy motives. The agents grumble, seeing the injury which is done to business, but they can hardly take the initiative. But the present Lord President has the real interests of his Court at heart; he has the intelligence to see evils, and the vigour to apply an adequate remedy; and it is to him we must mainly look."

The Sheriffs' Bill.—This Bill is almost the only product of the legislative efforts of Parliament as regards Scotland during the present session, and it is not very easy to refer it to any definite principle or policy. It carries out, indeed, the recommendations of the Royal Commission so far as they go, and it will improve by a hundred or two a year, if the treasury can be got to act on the very cautious recommendation of the Commissioners, the salaries of both Sheriffs and Sheriffs-Substitute. We presume the Bill is to be taken as a renunciation on the part of the Government of any intention of abolishing the Double Sheriffship. The changes made are not great, and the general impression appears to be that, except in the plea they afford against a penurious Government for an absolutely necessary increase of salary, the disturbance and inconvenience they occasion will not be compensated by any counterbalancing advantages. This we say is the general impression; our own opinion on this, and other kindred points, we reserve for a future occasion.

Appointments.—Mr HENRY COCKBURN MACANDREW, Procurator and Notary Public, Inverness, has been appointed Sheriff Clerk of Inverness-shire, in room of the late Patrick Grant, Esq. The salary

has been fixed at £600, with an allowance of £450 for deputies and clerks. It is stated that the appointment includes Nairnshire in the event of the counties being amalgamated.

Mr JAMES ARTHUR CRICHTON, Advocate (1847), has been appointed Sheriff of Fifeshire, in room of Lord Mackenzie. He is succeeded as Advocate-Depute by Mr ALEXANDER ASHER, Advocate (1861). It is announced that Mr GEORGE HUNTER THOMS, Advocate (1855), will be the Sheriff of the new Sheriffdom of Caithness, Orkney, and Shetland, and that he will be succeeded as Advocate-Depute by Mr JOHN BLAIR BALFOUR, Advocate (1861).

VACATION ARRANGEMENTS.

Box Days.—Thursday, August 25, and Thursday, September, 22d.

Vacation Courts.—LORD GIFFORD, on Wednesday, 31st August.

“ “ “ BENHOLME, on Wednesday, September 28.

(Rolls taken up on preceding Mondays.)

Bill-Chamber Rotation of Judges.

Thursday, 21st July, to Saturday, 30th July, - - -	LORD KINLOCH.
Monday, 1st August, to Saturday, 13th August, - - -	“ ORMDALE.
Monday, 15th August, to Saturday, 27th August, - - -	“ MURE.
Monday, 29th August, to Saturday, 10th September, - - -	“ GIFFORD.
Monday, 12th September, to Saturday, 24th September, - - -	“ MACKENZIE.
Monday, 26th September, to Saturday, 8th October, - - -	“ BENHOLME.
Monday, 10th October, to meeting of Court, - - -	“ KINLOCH.

AUTUMN CIRCUIT.

NORTH—LORDS JUSTICE-CLERK AND COWAN:—*Dundee*, Thursday, 1st September, at 12 o'clock noon; *Perth*, Monday, 5th September, at 1 o'clock afternoon; *Aberdeen*, Friday, 9th Sept.; *Inverness*, Wednesday, 14th Sept.
ÆNEAS MACBEAN, Clerk.

WEST—LORDS DEAS AND JERVISWOODE:—*Stirling*, Thursday, 22d September; *Inveraray*, Wednesday, 28th September; *Glasgow*, Monday, 3d October, at 1 o'clock afternoon.

HENRY H. LANCASTER, Esq., *Advocate-Depute*; WM. HAMILTON BELL, *Clerk.*

SOUTH—LORDS ARDMILLAN AND NEAVES:—*Ayr*, Friday, 9th September; *Dumfries*, Wednesday, 14th September; *Jedburgh*, Friday, 30th September.
HENRY J. MONCRIEFF, Esq., *Advocate-Depute*; ALEXANDER INGRAM, *Clerk.*

Obituary.—ROBERT LANDALE, Esq., junior, S.S.C. (1851), Depute-Clerk and Extractor of Teinds, died at Lasswade, June 24.

ALEXANDER MONCRIEFF WILSON, Esq., S.S.C. (1859), (Wilson, Burn, & Gloag, W.S.), died at Natal, April 25, aged 39.

ANDREW SYMONS, Esq., Writer, Musselburgh, and Inspector of Poor there, died June 30.

JAMES M'FARLANE, Esq., W.S. (1833), died at Edinburgh, June 18.

JOHN YOUNG, Esq., S.S.C. (1804), died at Broughty-Ferry, June 17.

PETER STEWART, Esq., S.S.C. (1865), (Marshall & Stewart, S.S.C.), died at Edinburgh, June 15.

DONALD HORNE, Esq., W.S. (1813), (Horne & Rose, afterwards Horne, Horne, & Lyell), died at Edinburgh, June 23, in the 83d year of his age. He was the second son of the late John Horne, Esq. of Stirkoka, in the county of Caithness, by Elizabeth, daughter of Colonel

Benjamin Williamson, of Banniskirk, in the same county. He was born at Dale House, Caithness, in 1787, and was educated at Musselburgh School and the University of Edinburgh. In 1843 he was appointed solicitor in Scotland for the Commissioners of Woods and Forests and Works and Public Buildings. Mr Horne, who was a magistrate and deputy-lieutenant for Caithness-shire, married in 1821 Jane, daughter of Thomas Elliot Ogilvie, Esq. of Chesters, Roxburghshire, by whom he has left four sons and two daughters.

LORD JUSTICE GIFFARD, died at 4 Prince's-Gardens, Hyde Park, July 13. The learned judge, who, both at the bar and upon the bench, was universally respected by the members of his profession, had been ailing for some time previously, but such a sudden termination to his illness had not been anticipated.

The Right Hon. Sir George Markham Giffard was a son of Admiral Giffard, by Susannah, daughter of Sir John Carter. He was born at the Admiral's official residence in Portsmouth dock-yard in 1813, and was educated at Winchester and at New College, Oxford, of which he became a Fellow. Subsequently he received the honour of B.C.L. from his University. He was called to the bar at the Inner Temple in Nov., 1840, and afterwards became a Bencher of his Inn. Rather more than 18 years after his call, and five years after his marriage to Maria, second daughter of Mr Charles Pilgrim, of Kingsfield, Southampton, he received a silk gown, and, confining his attention chiefly to the court of V. C. Wood, he secured a large practice at the equity bar. When, in the spring of 1868, Lord Cairns left the Court of Appeal for the Woolsack, and the present Lord Chancellor was appointed his successor, the vacant vice-chancellorship was offered to and accepted by Mr Giffard, who, according to the usual practice, received the honour of knighthood. In Dec., 1868, the elevation of Lord Justice Wood to the Woolsack, by the title of Lord Hatherley, created another vacancy in the Court of Appeal, and Sir G. M. Giffard then received the appointment of Lord Justice, with a seat in the Privy Council. He will be long remembered in Lincoln's-inn as a sound lawyer and a painstaking Judge.

Sir George Giffard is the fourth Lord Justice for whom the bell of Lincoln's-inn has tolled in less than four years, Sir J. L. Knight Bruce having died in Nov., 1866, Sir G. J. Turner in July, 1867, and Sir C. J. Selwyn in Aug., 1869. From the same Court, in the beginning of 1868, Sir John Rolt was compelled to retire by an attack of paralysis, after only a six months' tenure of the post, to the deep regret of the Chancery suitors, who regarded Lord Cairns and Sir John Rolt as forming one of the strongest Courts of appeal which had sat since the establishment of that tribunal.

Notes of Cases.

COURT OF SESSION.

FIRST DIVISION.

CRAWFORD *v.* MAGISTRATES OF PAISLEY.—June 15.

Expenses—Fees to counsel.—This case, which was disposed of on the merits some time ago, came before the Court to-day, upon objections by complr., Crawford, to the auditor's report. These objections were all

repelled; the Court taking occasion to say that there was no general rule that counsel were entitled to a second fee whenever a case begun on one day extended into a second day.

Act.—Mair, Agent—W. K. Thwaites, S.S.C.—Alt.—Watson. Agent—John Martin, W.S.

PET.—THOMBS.

Nobile officium—Authority to correct deed.—Petition for authority to correct the testing-clause of a recorded deed of disentail, in which the name of one of the instrumentary witnesses had been erroneously written. The Court refused the petition, holding that the cases founded on were all cases in which the errors had been committed by public officers in transcribing deeds into registers or otherwise. Here the blunder was that of the party's agent.

Act.—Shand. Agents—Hill, Reid, & Drummond, W.S.

STUART v. EARL OF SEAFIELD.—June 17.

Sheriff Court Act 1853.—Suspension and interdict, in which the question arose whether a certain action in the Sheriff Court of Banffshire stood dismissed on 15th Nov., 1865, to the effect of making the interlocutors pronounced after that date null and void, as being in excess of the Sheriff's jurisdiction. It was alleged that no procedure had taken place between 17th May and 11th October, 1865. The Court was of opinion (1) that the lodging of defences by the defr. on 8th July, and the S.S. on the process being transmitted to him, writing an interlocutor appointing the parties to meet with him, and another interlocutor pronounced on the craving of defr. on 11th Oct., were such proceedings as to interrupt the currency of the three months; (2) that the litigation which had taken place for three years after the date in question, which was within the second period of three months, implied a consent on the part of defr. to the revival of the action, and barred him from now objecting to the competency of the interlocutors. The Court held consent of the parties, whether express or given by implication, to be a sufficient revival of an action under this section of the statute.

Act.—J. C. Smith. Agents—Mailand & Lyon, W.S.—Alt.—Sol.-Gen. Clark, Marshall. Agents—Mackenzie, Innes, & Logan, W.S.

NEILSON AND OTHERS v. BARCLAY.—June 17.

Patent—Process—New trial.—The jury at the last sitting returned a verdict in the following terms:—"Find under the pursuer's issue that the patent has not been infringed at the Addiewell engine, Fauldhouse steam-engine, or the Foundry engine, Kilmarnock, but that the patent has been infringed by the defender at the larger engine at the fitting-shop of the defender's works at Kilmarnock: Find that the improvement on Giffard's injector claimed by the pursuer is a new invention as claimed by the pursuer. On the three counter-issues, find for the pursuer."

Defr. obtained a rule upon the pursuers to show cause why this verdict should not be set aside as contrary to evidence, in so far as unfavourable to the defender. The Court having made avizandum, the rule was unanimously refused.

Held that there was substantially two questions; (1) whether the apparatus attached to the engine in the fitting-shop was an infringement of Morton's patent. That was a question of much nicety and difficulty, but

it was impossible to say that the jury were not justified in reaching the result which they did; (2) whether an apparatus substantially the same as Morton's was, prior to the patent, experimented with in defr.'s works with Morton's knowledge. As to this matter there was a conflict of evidence, and the question turned mainly on the credit which the jury attached to the one set of witnesses or the other. It was pre-eminently a matter for the jury, and one in which the Court could never interfere with the jury's decision.

RANKEN v. BEVERIDGE.—June 17.

Trust—Destination—Fee.—Special case between Francis Ranken, and Alex. Gibson Beveridge, an infant, and his administrator-in-law, heir-at-law of his mother, Mrs Margaret Gibson or Beveridge. An infant daughter of Mrs Beveridge was afterwards, on the suggestion of the Court, made a party to the special case. The question arose under the trust-disposition and settlement of the deceased John Ranken, and was as to the meaning of the second purpose of the deed, by which the trustees were directed to convey a dwelling-house and furniture in Fyfe Place to the truster's eldest sister Susan Ranken, in liferent, and to her children equally in fee, whom failing, to his youngest sister Mrs Margaret Ranken or Gibson, wife of Mitchell Gibson, then harbour-master in Leith, and her children equally in fee, whom all failing, to the truster's own nearest heirs whatsoever. The truster declared that, "by the words whom failing used in this deed when applied to children, my meaning is that the substitution should subsist and take effect in the case of children dying after being born, as well as in the case of their never having existed." The truster died Sept. 10, 1837, survived by his two sisters, and by his only brother, Francis Ranken. Susan Ranken died unmarried and intestate in 1855. Mrs Margaret Ranken or Gibson survived her husband, and died Sept. 4, 1865. Her only daughter, Mrs Beveridge, was married in 1862, and died in Oct., 1864, leaving two children—Alexander and a daughter. The question was, whether the fee of said house belonged to Francis Ranken as heir of the truster, or to Alexander Gibson Beveridge as son and heir-at-law of his mother, Mrs Beveridge; or to A. G. Beveridge and his sister equally between them?

Held that the judgment must depend on the effect of a disposition by which the trustees, in April, 1838, conveyed the subjects to Susan Ranken in liferent, and the other parties, in terms of the destination of the trust-deed. The full right of fee came to be in Mrs Gibson, and her children would have taken in terms of the destination if they had survived her. But she left no children, and her grandchildren took as heirs of provision. The word children included grandchildren, but the direction to divide equally applied only to the immediate descendants of the *nominatim* disponee, and after that heirs in heritage of these children must take, just as if the clause had run "to her children equally among them and their heirs." The destination or clause of return to the heirs of the granter could not take effect so long as there were either children or grandchildren of the *nominatim* disponees.

Counsel for Mr Ranken—Millar, Duncan. *Agents*—J. & R. Macandrew, S.S.C.
Counsel for A. G. Beveridge—Sol.-Gen. Clark, Balfour. *Agents*—Gibson-Craig, Dalziel, and Brodies, W.S.

Counsel for the Infant Daughter—Watson.

HALL v. COLQUHOUN.—June 21.

Delegation—Bankruptcy—Claim—Affidavit.—Action against Duncan Colquhoun, master mariner, Tyree, for £402, being the amount of an account for coal furnished for the use of the steamship *Argyle*, which belonged, during the currency of the account, to defr. and Dick, shipowner, Glasgow, in equal parts. Defence, that by his mode of dealing during the currency of the account, and by his conduct when defr. sold his share of the ship to Dick, pursuer had taken Dick as his sole debtor, and by implication had discharged defr. The L. O. (Neaves) sustained this defence. The Court reversed, and held (L. Kinloch diss.) that pursuer had granted no implied discharge to defr. Defr. founded on affidavits made by pursuer in claiming as a creditor in respect of the same account in the sequestration of Dick, and with regard to which he stated in his evidence in this case that he did not make oath to the verity of these claims. "There is no oath given with these affidavits in Glasgow." The affidavit bore, as usual, that the claimant had been sworn. The Court animadverted in strong terms upon the practice which appeared to exist in Glasgow of not formally swearing persons making affidavits of this kind, and pronounced an interlocutor directing the Clerk of Court to lay the proceedings in the case before the Lord Advocate, and inviting his Lordship's attention to the erroneous practice which appeared to exist.

NEILSON AND OTHERS v. BARCLAY.—June 23.

Patent—Verdict.—This case came to-day before the Court on counter-motions by both parties to apply verdict. Pursuers contended that, having established the validity of their patent and an act of infringement, they were entitled to interdict, in terms of the prayer of their note. Defrs., on the other hand, contended that the infringement found by the jury was not within the record, and that therefore the note of suspension should be refused; and that at all events the pursuers, having failed in regard to three of the instances of infringement alleged by them, there should be no expenses allowed. Held that the infringement found by the verdict was within the record and issue, and therefore that pursuer was entitled to interdict as craved, subject, however, to a finding that the apparatus as to which defrs. had been successful did not constitute infringements of the patent; and with regard to expenses, the Court held that in the whole circumstances the pursuers should get expenses, but subject to modification of one-fourth.

Act.—Sol.-Gen. Clark, Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.—Alt.—Watson, Balfour. Agents—Macnaughton & Finlay, W.S.

LAIRD'S TRUSTEE v. REID & Co.—June 23.

Process—Declaration—Property—Foreshore.—Declarator, removing, and interdict, against John Reid & Co., shipbuilders, Port-Glasgow, in regard to certain stakes erected in May, 1869, on the foreshore in front of the property of the defr., and of another property which belonged to pursuer and two other *pro indiviso* proprietors. Pursuer alleged that the stakes were erected on his property, and asked to have them removed. Defrs. pleaded that the action was incompetent, not being sued by all the *pro indiviso* proprietors. The L. O. (Ormidale) repelled this plea, and allowed a proof, after which he held pursuers entitled to a possessory judgment, and ordered the removal of the stakes. Defrs. reclaimed. The Court, of consent,

superseded consideration of the case till defrs. should raise an action of declarator, in which the question of property raised between the parties might be settled; and it was arranged that the proof led in this process should be imported into the new action. *Held* that the declaratory conclusions in the present action could only be supported as being truly ancillary to the interdict, for an independent declarator of property, at the instance of one of several proprietors, could not be sustained.

Act.—*Millar, Burnet.* *Agents*—*Adam & Sang, W.S.*—*Alt.*—*Lancaster, H. J. Moncreiff.* *Agent*—*W. Mason, S.S.C.*

WALKER v. RUSSEL.—June 24.

Poor—Settlement—Forisfamiliation—Lunatic.—Action by the Inspector of Poor of Stow against the Inspector of Clackmannan, to recover moneys expended on the relief of a pauper named Margaret Miller. She was daughter of John Miller, who was born in Clackmannan in 1793, and when about 20 years of age went to England, where he became a hawker. In 1822 he was married at Cheltenham, and the pauper was born in England in 1829. A few years afterwards Miller deserted his wife, who, with the pauper and a son, travelled about the country as a hawker. Latterly the pauper's mother and herself followed the same course of life in England and in Scotland, till the mother died in 1866. They did not beg or obtain parochial relief. After the mother's death, the pauper herself went about the country without begging, and without becoming an object of parochial relief until, in May, 1867, she was delivered of a child in the parish of Stow. At this time she became seriously ill, her mind was affected, and she was admitted into Morningside Asylum. The L. O. (Neaves) finding the above facts, and also that the pauper before she became chargeable, though naturally of weak intellect, was not a lunatic nor a natural idiot, held that the claim of relief against the parish of Clackmannan was not well founded, and assoilzied.

The parish of Stow reclaimed. The Court unanimously adhered. The pauper, though always peculiar, and perhaps excitable, had not been incapable by reason of idiocy or mental weakness of acquiring a settlement. The second point argued was that, as the woman had no other settlement in Scotland, she must fall back on her father's birth-settlement. The Court held that this case was really settled by the decision in *Craig v. Greig and Macdonald*, July 18, 1862 (1 Macph. 1172), where it was held that a child *forisfamiliated* before he became a pauper takes his own birth-settlement, and not that of his father. The only difference was that there the pauper had another competing settlement in Scotland; but that could make no difference in principle. The grounds on which *Craig's* case was decided were—(1) That there are but two kinds of settlement—birth-settlement and residential settlement; (2) That emancipation breaks altogether the connection of the child with the father's family, and the settlement derived from the father is at an end. The time at which the settlement was to be ascertained was when the pauper became chargeable. Here the party in question was nearly forty years of age; and it could not be maintained on any known principle of the Poor-law that she had a settlement in Clackmannan parish.

Act.—*Millar, Burnet.* *Agents*—*H. & A. Inglis, W.S.*—*Alt.*—*Fraser, Balfour.* *Agents*—*H. G. & H. Dickson, W.S.*

UNION BANK OF SCOTLAND *v.* M'MURRAY.—*June 30.*

Cautioner—Joint and Several Liability.—Action against M'Murray, paper manufacturer, London, concluding for £13,566 and interest, alleged to be due by him in terms of certain writings, dated 11th Nov., 1856, in connection with the purchase by defr. of Springfield Paper Mills from the trustee on the sequestrated estate of Cameron & Co., and under certain bills and promissory notes granted or endorsed by defr. to pursuers. The L. O. (Mure) having considered a report by an accountant, held, upon a construction of the documents in question, that the rights and interests of parties under this action must be regulated by these documents, and that the sum due by defr. to pursuers, as at 4th March, 1864, amounted to £13,875 3s 7d, under deduction of £1742 0s 8d, being the balance of principal and interest claimed by the pursuers as due upon a bill for £5000, granted to them under the second of these agreements. The Court, on a reclaiming note, altered with respect to this deduction. Their Lordships held that Mr M'Murray was liable under that bill, notwithstanding that the bank had by agreement given time to Messrs Durham & Son, the other parties on the bill, in respect that, in truth, Mr M'Murray, though he had right of relief against Durham & Son, had been a principal debtor to the bank in the bill, and the equity of cautioners in regard to giving time did not apply to him. Some of their Lordships were also of opinion, upon the evidence, that even if he had been a cautioner, he had been made acquainted with the agreement to give time, and therefore could not plead that equity.

Act.—Decanus, Millar, Marshall. *Agents*—Bell & M'Lean, W.S.—*Alt.*—Sol.-Gen. Clark, Adam. *Agents*—A. & A. Campbell, W.S.

EARL OF GALLOWAY *v.* MAGS. OF WIGTOWN.—*July 8.*

Salmon-Fishing—Title—Prescription—Burgh.—Declarator that defs. had no right of salmon-fishing in the rivers Cree and Bladenoch and Bay of Wigtown, at least *ex adverso* of pursuer's lands, and that pursuer had the sole right to the fishings in virtue of his titles and of possession. The L. O. (Jerviswoode) after proof decided in favour of pursuer. The Court held that the burgh had no title to the fishings, still less such possession as would entitle them to prevail if they had a *prima facie* title. The pursuer had produced an *ex facie* title, which he might ultimately assert to the full extent claimed. But it was not necessary to determine the extent of his right in the absence of a proper contradictor, he having thought it unnecessary to call the Crown, and it was proper that the declaratory conclusions should be dismissed.

Act.—Fraser, Marshall. *Agents*—Russell & Nicholson, C.S.—*Alt.*—Sol.-Gen. Clark, Burnet. *Agent*—R. Macwilliam, S.S.C.

FINLAY *v.* NORTH BRITISH RAILWAY COMPANY.—*July 8.*

Carriers—Railway and Canal Traffic Act—Just and reasonable condition—Accidental detention of Perishable Goods.—Thomas Finlay, fishmonger, Leith, sued for £37 19s, being damages by the defs. having failed duly and timeously to deliver in London a quantity of sprats. Defs. founded on a contract, by the terms of which two rates of carriage were offered by them—the lower, implying that the company should be relieved of "all liability for loss and damage by delay in transit, or from whatever cause arising." Pursuer, with reference to this, had written to defs. requesting

them to forward all fish delivered by him on his account at the lower rate, and undertaking to free and relieve the company from all claims or liability for loss. Pursuer pleaded that this was not a just and reasonable condition in terms of s. 7 of the Railway and Canal Traffic Act, in respect that if he paid the higher rate it would be impossible to carry on his trade, and he was thus forced to agree to the lower, and that it was plainly unreasonable to free the company from liability for their own negligence and misconduct. He also contended that defrs. had committed a breach of a special contract to forward the sprats in question by a particular train. Proof was led, and the L. O. (Jerviswoode) assoltized in respect of the contract. Pursuer reclaimed.

The Court adhered (L. Kinloch diss., on the grounds that a special contract had been proved to forward by particular trains, which had not been fulfilled.) The majority held that the condition in question—which was to be read as applying to delay in transit only, and giving no effect to the words “from whatever cause arising,” which were unreasonably wide—was just and reasonable. It did not exclude liability for fault on the part of the company causing delay, but intended that the mere occurrence of delay should not subject the company in damages, as if they had given a guarantee of time. The common law did not, indeed, include such a guarantee within the obligations of ordinary carriers; but it might be conceived, since the introduction of steam conveyance that, in regard to perishable goods transported for a particular market, such an implied obligation as to time might arise; and so far as this condition guarded against such an anticipated obligation, it was just and reasonable. Pursuer's contention that he was forced into the condition was not made out, because it rather appeared from his own statement that even the higher rate of freight left a sufficient margin for profit. On the proof, he had failed to establish a special contract, or that the company had failed to forward the fish with reasonable despatch, or more properly, without unreasonable detention. Accidental delay arising from the exigencies of traffic was one of the risks for which railway companies could not be called on to pay damages.

Act.—Sol.-Gen. Clark, Johnstone. *Agents*—Marshall & Stewart., S.S.C.—*Alt.*—Shand, Balfour. *Agents*—Dalmahoy & Cowan, W.S.

PEEBLES OR SCOTT v. PETER PEEBLES AND OTHERS—July 8.

Executors—Will—Codicil.—The late Peter Peebles, of Linlithgow, left a will in favour of four relations, whom he also named executors. By codicils he recalled the provisions in the will, leaving Mrs Scott, appt., as the sole legatee. The Commissary for Glasgow (Galbraith) granted confirmation in favour of the four persons originally nominated, holding that the codicils did not recal the nomination of executors. Mrs Scott appealed, but the Court adhered.

Act.—Watson.—*Alt.*—M'Laren.

HAMILTON v. DUNOON POLICE COMMISSIONERS.—July 9.

Gen. Police Act—Clerk to Commissioners.—Pursuer was clerk to the Police Commissioners of Dunoon, and after being a year in office was dismissed. He brought this declarator that he held office *ad vitam aut culpam*, and was not removable at pleasure. He was appointed under s. 67 of the General Police Act 1862, which is silent as to removability, but defrs.

maintained that s. 64 rendered pursuer removable at pleasure. The L. O. (Mure) repelled the defrs'. plea on this point *hoc statu*, and allowed proof, observing that he was not prepared to hold that clerks, appointed to discharge the duties required of the clerk appointed under s. 67 of the statute, are removable at the pleasure of the Commissioners in the summary way in which pursuer appeared to have been removed. If, however, defrs. could show, as they alleged, that pursuer's original appointment was only for one year, and thereafter renewed *ad interim* merely, that may place defrs. in a different position in the above respects. If, on the other hand, it should be decided that the pursuer's appointment as clerk was one *ad vitam aut culpam*, the L. O. did not think he would be warranted in holding, without inquiry, and assuming the facts set forth in the defences to be true, that the grounds upon which it was alleged that defrs. acted in removing the pursuer were insufficient to justify the removal. Before, therefore, disposing of the abstract question of law, the L. O. deemed it necessary to have the facts on which the parties are at issue ascertained.

Defrs. obtained leave, and reclaimed. It appeared in the course of the discussion that the case could not satisfactorily be disposed of without proof, and as the Court appeared to be clearly of that opinion, the Lord Ordinary's interlocutor was adhered to, and expenses allowed against the defenders from its date.

Act.—Scott. Agent—W. Officer, S.S.C.—*Alt.*—Sol.-Gen. Clark, Hall, W. P. Hunter. Agents—Macnochie & Hare, W.S.; John Galletly, S.S.C.

BOYLE v. HUGHES.—July 13.

Sale—Warranty.—Action for £329 15s 10d as price of kelp furnished to defr. by pursuer. Defence, that the kelp sent was disconform to contract, and had been duly rejected. The L. O. (Mure), after proof, found that in March, June, and July, 1869, pursuer undertook to supply defr., at £6 14s per ton of 21 cwt., with about 300 tons of kelp of the same kind and quality as that which he had supplied to defr. by the Flora Kelso in June, 1868; that in August and Sept., 1869, about 307 tons were so delivered as in fulfilment of the contract, but were on arrival rejected by defr.; that pursuer had failed to prove that the kelp so delivered was of the same quality as that supplied by the Flora Kelso, and that defr. was warranted in rejecting the said kelp as not being of the stipulated quality. His Lordship's judgment rested on the assumption that this warranty of quality implied that the kelp to be furnished should yield as large a quantity of iodine as had been yielded by the cargo of the Flora Kelso, which, according to the analysis of the defender himself, appeared to have contained 20 lb. of iodine to the ton. The pursuer reclaimed. The Court, however, did not think that the pursuer had undertaken so high a warranty, because (1) if that had been intended, it would have been expressed as a warranty the kelp would yield a certain quantity of iodine; and (2), if it had been proposed by defr., pursuer, not being a man of skill, would have taken advice, and then would have been told that it was utter madness to give such a guarantee, because no Donegal kelp would produce so much iodine. Kelp might produce more or less iodine according to season and circumstances, and all that pursuer could be held to have undertaken was to secure his materials, and manufacture his kelp in such a way as to produce substantially the same kind and quality of article as he had sent in 1868. It was proved that this limited warranty had been fulfilled, and

it was not proved to the satisfaction of the Court that the yield of iodine from the kelp of 1869 was so much less than from that of 1868 as was alleged. The Court therefore altered, and decided in favour of the pursuer.

Act.—Fraser, Black. Agent—D. Curror, S.S.C.—Alt.—Shand, M'Lean. Agent—J. & R. Macandrew, W.S.

EISTENS v. NORTH BRITISH RAILWAY Co.—July 14.

Reparation—Action by Collateral Relation.—Action by the sisters of a gentleman who died in consequence of the injuries which he received while travelling to London in May, 1869, as a passenger by railway, through the negligence of persons for whom defrs. are responsible. Pursuers claimed damages on the grounds that they were injured in feelings, and have also been deprived of their only means of subsistence. The L. O. (Ormidale) dismissed the action on the ground that the pursuers being only collaterally related to the deceased, could not insist in such an action as the present on the ground merely that they had suffered in their feelings by his death (*Greenhorn v. Millars*, June 13, 1855, 17 D. 860). The pursuers could not sue as executors of their brother, no action for reparation having been raised by him during his life, and there was no privity between them and the defenders in respect of which they could sue “either *ex contractu* or *ex delicto*.” Neither on the principle of the case of *Greenhorn* could the pursuers take any benefit from the analogies derived from the law of assythment, the element of criminality being wanting in this case also. Pursuers could not sue on the ground that they had any legally enforceable obligation against their brother to support them, but merely that they had a reasonable expectation that he would do so—a principle according to which every insurance company holding a policy on his life, and even tradesmen with whom he usually dealt, might be entitled to insist on such an action as the present. Pursuers reclaimed.

The LORD PRESIDENT said that this was not an action of assythment. There was no crime, or even delict, by defrs. The fault was alleged to have been committed by a servant of the North-Eastern Ry. Coy. for whom that company was answerable, and defrs. were said to be answerable for that company, not because they were answerable for their delicts, but because the contract of carriage they had entered into with the deceased implied that they were to carry him safely to the end of his journey. The claim, therefore, rested on contract, and it was desirable to lay aside all considerations drawn from the old law of assythment. The deceased could undoubtedly have maintained an action for injuries if he had survived; and the question was whether there was any one else who could now do so. No claims had hitherto been sustained in our law, except such as arose out of the relation of husband and wife, or parent and descendants. On the other hand, where the pursuer could qualify no pecuniary loss, claims had been sustained in Scotland by a husband for the death of his wife, or by a parent for the loss of his child. The true foundation of such claims when sustained was, partly nearness of relationship, and partly another relation recognised by law—viz., the mutual obligation of support in case of necessity. On these grounds, persons might sue for *solatium* or reparation. He therefore thought that collaterals had no claim. The claim for *solatium* had been negatived in the case of *Greenhorn*, and if such a claim was not sustained, there was still less ground for a claim for pecuniary loss. He had no doubt that if

the Judges who decided Greenhorn's case had applied their minds to it, they would have found the question as to pecuniary loss attended with even less difficulty than the other. As such claims were peculiar to our system, it was not desirable to extend them to cases where they were not previously recognised.

Lord ARDMILLAN concurred. It had been attempted to sustain the action on the ground of dependence alone, but that might exist where there was no relationship. There was no law for sustaining such a ground of action.

Lord KINLOCH concurred.

Lord DEAS, in concurring, said he did not prejudge the question whether, if assythment had lain against the company's servants, the rule admitting collaterals to sue would not have been extended against the company. His Lordship held that, as it was necessary to draw a line in regard to such claims somewhere, and as practice had stopped at collaterals, that was a strong reason for not going further.

The Court adhered.

NORTH BRITISH RAILWAY Co. v. CARTER (PENDREIGH'S TRUSTEES).—July 15.

Railway Clauses Act—Retention and Sale by Railway Co. for Tolls and Carriages.—Appeal from Sheriff of Mid-Lothian in a petition at the instance of the N. B. R. Co. against the trustee of J. & G. Pendreigh, brewers, Abbeyhill, and of J. & G. Pendreigh, grain merchants, Gorebridge. The two firms of J. & G. Pendreigh consisted of different partners, and carried on different businesses near Edinburgh, but they were connected in business, some of the partners being the same, and they became bankrupt together. Both firms had been in the habit of sending goods by petra's railway. There were no means of distinguishing the goods belonging to the firms, and the practice and the only possible course was to charge all the goods against J. & G. Pendreigh, leaving the apportionment for subsequent adjustment. At the bankruptcy, the firms owed considerable sums for toll and carriage, and the company had goods in its hands belonging to both. The company, desiring to avail themselves of the power to sell the goods so being in their hands, under s. 90 of the Railways Clauses Act, presented this petition. The S. S. (Hallard) held that service of the petition on the trustee was sufficient demand for payment in terms of the statute. The Sheriff (Davidson) held that no such demand had been made, and dismissed the petition. This was on 11th April, 1870. Previously, on 24th June, 1869, the S. S. appointed condescendence and defences, and, "under reservation of all rights and pleas of parties and of consent," granted warrant to sell the goods.

Petra appealed.

LORD PRESIDENT—At common law the railway company were entitled, as carriers, to retain goods in their hands only till carriage or tolls applicable to these goods were paid. The statute introduced two novelties—(1) a right of retention for charges on other goods; (2) a power to sell the goods so retained if payment is not made after demand. In order to have this privilege, the company must strictly comply with the condition—viz, that a previous demand shall be made. It was not provided, however, that the demand should be made, or that the failure to pay should be ascertained,

in any particular manner. If, without any judicial proceeding, the company proceeded to sell without a previous demand, or upon an imperfect demand, the sale would be null, and the proceeds would belong to the debtor. This case was somewhat different from that supposed. A judicial proceeding was not contemplated by the statute, but it was no doubt judicious and proper. The railway company accordingly presented a petition to the Sheriff, and asked service of it on resp't., as trustee on both estates, and it was contended that that was equivalent to a demand. A good deal might be said for that view. What the trustee required was sufficient notice, and it might well be contended that that was given. It was not necessary, however, to go on that ground for recurring to the judgment of the S. S. If the service was not equivalent to a demand in terms of the statute, it might reasonably be held that the parties had dealt with it before the Court as such, and could not now resile and say it was a bad demand. What effect ought to be given to the clause in the interlocutor "reserving all rights and pleas of parties?" If the plea that no demand had been made had then been stated, and if the trustee consented to the sale, it is not now probable for him to say that the sale was unwarranted and illegal. But could it have been stated on the 24th June? Certainly not in the terms in which it was now stated, because it would be inapplicable to the then state of facts. It was suggested that another plea could have been stated, that the petition was bad, because no demand had been made; but it was not conceivable that, if so, the railway company would have gone on, having it in their power to make a demand for payment, which could have been done then in the presence of the Sheriff, so as to satisfy the statute. It was impossible to give effect to such an objection when resp't. came into Court knowing of it, and yet consenting to the warrant of sale. It must be held, therefore, that he had waived this objection. His Lordship was also of opinion that the objection that no proper demand had been made in respect the debt due by the two firms had not been distinguished, was not good. The trustee no doubt was the true debtor for the whole sum claimed.

Lord DEAS differed. The question decided by the Sheriffs was of great general importance—viz, whether, in order to entitle a railway company to the benefit of the statute, it is enough to make an implied demand in the petition in which they apply for a warrant. His Lordship thought that could not be done. The statute gave a power beyond the common law, and the question he had put could not be answered merely by showing that the company were entitled at the date of the petition to sell the goods, if they had not asked a warrant. The question was, whether at the date of presenting the petition, they were entitled to get a warrant. They had no right to bring a man into Court on the footing that service was sufficient demand of payment. He ought to have an opportunity to pay, because it was a serious thing to bring a man into Court. Therefore, no proper demand had been made. The plea of no proper demand had not been waived, but was reserved. The pleadings and the judgments showed this, and the idea that it had been waived was never suggested till it was mooted by this Court in the course of the discussion.

Lords ARDMILLAN and KINLOCH concurred in the result at which the Lord President arrived, and the Court reversed the judgment of the Sheriff, and substantially affirmed that of the S. S.

SECOND DIVISION.

HIGHLAND RAILWAY Co. v. FOSTER AND OTHERS.—June 15.

Parish—Assessment for Manse—Real or valued rent.—The question in these cases (a reduction and appeal) was whether the heritors of the parish of Kinclaven were entitled to impose an assessment for the repair of the manse, according to the *real rent* of their several properties, or whether they were bound to adopt the old *valued rent* as the basis of the assessment. The railway company, whose share of the real rent is £577 per annum, and whose share of the valued rent would be quite trifling, maintained that the parish, being purely landward, all ecclesiastical burdens fell by established usage to be levied according to the valued rent. The heritors maintained that, there being no statutory rule, they were entitled to depart from the customary rule whenever the proportions of valued rent did not approximately correspond with those of the real rent; and they founded upon the Peterhead case (4 Pat. App. 356), where the House of Lords sanctioned an assessment according to the real rent in respect of growth of fens, etc., within the parish. The L. O. (Mure) assailed defra, holding that the principle of the Peterhead case was wide enough to apply to landward parishes wherever the circumstances rendered an adherence to the valued rent inequitable. Pursuers reclaimed, and their reclaiming-note was taken up along with an appeal at their instance, involving the same question, from the Sheriff Court of Perthshire. The Court unanimously affirmed the judgment of the L. O., reserving their opinions whether the heritors had not an option in the matter, and whether if they had laid on the assessment according to the valued rent, the Court would have interfered.

Act.—Sol.-Gen. Clark, Lancaster. *Agents*—H. & A. Inglis, W.S.—*Alt.*—Millar, Adam. *Agents*—Tods, Murray, & Jamieson, W.S.

CALEDONIAN BANK v. KENNEDY'S TRUSTEES.—June 15.

Cautioner—Guarantee.—Action by Caledonian Banking Company for enforcing payment under a letter of guarantee, dated in May, 1856, granted by the late Lachlan Kennedy, Nairn, in security of an overdraft granted by pursuers to Kennedy's nephew, the late Duncan M'Edward. The amount guaranteed was £400, and the amount due by M'Edward to the bank at the time of his death was £778 14s 8d. This amount consisted of the balance of a current account which began to be overdrawn about the date of the guarantee, and was operated on subsequent to Kennedy's death in 1861, and down to M'Edward's death in 1863. Defence—(1), that the guarantee was not a continuing guarantee, but came to an end on 26th March, 1857, when M'Edward stood creditor in the account current to the extent of £4 17s 11d; (2), that the pursuers had liberated the guarantor's representatives by giving time to the principal debtor; (3), that they had also liberated them in respect of a transaction whereby, with consent of the bank's agent at Nairn, who was one of Kennedy's trustees, a sum of £600 was paid to the principal debtor out of Kennedy's estate, and applied by him in reducing the *unsecured* balance due to the bank. There were also other defences, but the above were those mainly relied on. After proof, the L. O. (Ormidale) repelled the defences, and found for pursuers.

Defenders having reclaimed, the Court altered, and, proceeding upon the proof, sustained substantially the last two grounds of defence, and assolizied. Their Lordships were, however, of opinion that the guarantee was a continuing guarantee, as contended for by pursuers; and in respect that so much of the controversy in the case had related to that question, they only allowed defra. the expenses of the proof and the subsequent expenses.

Act.—Marshall, Maclean. *Agents*—Adam & Sang, S.S.C.—*Alt.*—Horn, M'Laren. *Agents*—Scott, Moncrieff, & Dalgety, W.S.

MRS MACKIE'S TRUSTEES v. MACKIE AND OTHERS.—June 24.

Succession—Mutual Disposition—Revocation.—M.P. brought to determine *inter alia* the question whether the estates, heritable and moveable, which belonged to the late Agnes Craich and Mr and Mrs Mackie, all residing near Alloa, fell to be divided in terms of a mutual trust-disposition and settlement executed by these three parties in 1854, or in terms of certain other deeds executed by Agnes Craich and Mrs Mackie jointly, after Mr Mackie's death, and by Mrs Mackie after the death both of her husband and Agnes Craich. John Craich, coalmaster, near Alloa, died Feb. 22, 1854, intestate and without issue, and his three sisters, Agnes, Mary, and Christian, the wife of James Mackie, succeeded to his heritable and moveable estates. Mary Craich died on 17th April, 1854, unmarried and intestate, survived by her two sisters and Mr Mackie. There does not appear to have been any marriage contract between Mr and Mrs Mackie, and Mr Mackie therefore acquired right to his wife's share of her deceased brother's and sister's moveable estate. Thereafter Agnes Craich and Mr and Mrs Mackie executed the *mortis causa* trust-disposition and settlement, dated 9th and 10th May, 1854. By that deed they conveyed *mortis causa* to the pursuers and the now deceased Joseph Mackie, as their trustees, to the effect therein written, their whole moveable estate and heritable estate; and bound themselves to infeft their trustees in the subjects thereby disposed to them, and to warrant their said means and estate, and their said disposition to the trustees, at all hands, and against all deadly. The trust purposes were—First, the “payment of any debts that may be due by us at our death, including our deathbed and funeral expenses, and the expenses of executing this trust.” Secondly, the allocation and division of the whole said means and estate, heritable and moveable, belonging to the testators, in shares of one-fifth, among the five children of Mr and Mrs Mackie and their issue, “declaring that the said shares shall not vest in the said parties or their issue or heirs until the death of the longest liver of us, the said Agnes Craich, Christian Craich or Mackie, and James Mackie,” and provision was made for the event of any of these children predeceasing the longest liver of the testators without issue. After giving, in the third place, certain directions to the trustees when making the allocation of their estate before mentioned, with a view to their properties of Carsebridge and Chapelhill, conveyed by the deed, remaining in the family, the deed proceeds as follows:—“Reserving always, and giving and granting to us, and each of us, and the survivor of us, the whole estate hereby disposed by us, and also reserving to us full power during our lives, or even on deathbed, to burden, as also to alter, to innovate, or revoke these presents, in whole or in part, as we shall see cause; and we dispense with the delivery of these presents, and we resign the said subjects and others for new infeftment; and we assign the rents, and we consent to

the registration hereof for preservation. Moreover, we desire any notary-public to whom these presents may be presented to give to our said trustees and their foressaids sasine of the lands, subjects, and others above disposed." James Mackie having died on Feb. 23, 1857, Agnes Craich and Mrs Mackie executed, on May 11, 1860, a codicil purporting to revoke the provision made in favour of one of James Mackie's children by the foressaid trust-disposition and settlement, and otherwise to alter that deed. Agnes Craich having died on April 14, 1863, Mrs Mackie executed thereafter the two deeds mentioned in the foregoing interlocutor, purporting to alter and recal the said disposition and settlement. The question now presented for decision was whether the trust-disposition and settlement of May 9 and 10, 1854, could be altered after the death of James Mackie by Agnes Craich and Mrs Mackie, and after the death of Agnes Craich by Mrs Mackie.

The L. O. (Mackenzie) held that the trust disposition and settlement of May 10, 1854, was a mutual settlement of the estates of the granter, which was not revocable by the survivors or survivor after the death of one or more of them. He therefore found that the succession fell to be regulated by that deed alone. John Mackie, reclaimed, and argued that the opening clause of the reservation above quoted conferred a fee and absolute power of disposal upon the survivors of the granter. The Court adhered. *Held* that, whatever might have been the effect of the clause if it stood alone, the subsequent clauses clearly implied that the power of revocation was only to be exercised during the joint lives of the parties.

Act.—Fraser, Kinnear. Agents—Murray, Beith, & Murray, W.S.—Alt.—Sol.-Gen. Clark, Balfour. Agent—C. S. Taylor, S.S.O.

MELDRUM v. HORSBURGH.—June 28.

Road Trustees—General Turnpike Act.—Appeal from Fifeshire in a summary application, presented by respt. as representing the road trustees of Cupar district, for removal of a wall built by appt. across a road, which the road trustees claimed right to use for transport of stones from Craigfoodie Quarry. The trustees maintained their right in virtue of the General Turnpike Act 1 and 2 William IV., c. 43, s. 80. The defence was that the provision in question did not apply, in respect that the road in question embraced part of the avenue to appt.'s house, and that, fairly construed, avenues were exempted from the enactment founded on. The S.S., and on appeal the Sheriff, found in favour of the trustees, holding that the exception of the statutes in favour of avenues only applied where there had been no previous use to take materials along the particular avenue, whereas in the present case the trustees had for many years prior to 1830, and from 1863 downwards, been in use to take stones across or along the road here in question.

The Court adhered; but Lords Cowan and Neaves proceeded wholly upon the ground that in point of fact the road in question did not form an avenue, having been used till shortly before the date of the petition as an access, not only to the house of Craigfoodie, but as a servitude road open to the proprietor of the estate of Wester Craigfoodie and his tenants. Lord Benholme took the same view as the Sheriffs. The L.J.C. was absent. Their Lordships explained that they did not in any way prejudge the question whether Mr Meldrum might not be entitled to have it found in a declarator that the road in question is now an avenue, in respect of the

servitude over it being now discharged. It was enough for the decision of the case that the Trustees were entitled to use the road without obstruction till that matter was judicially determined against them.

WIGHT v. PRESBYTERY OF DUNKELD.—June 29.

Jurisdiction—Church Court—Tholing assize.—Note of suspension and interdict for the minister of Auchtergaven. On Dec. 14, 1869, the Presbytery of Dunkeld served a liable upon complr., charging him with "fornication, as also indecent and scandalous familiarity by a minister of the gospel with a woman, to the disgrace of the sacred profession of a minister." On Dec. 30, 1869, complr. lodged answers, objecting to the relevancy, and pleading not guilty, and on Jan. 4, 1870, the libel was found relevant, and a committee appointed to confer with complr. This committee dealt with complr., and he acknowledged that he had been guilty of that part of the alternative charge which accused him of scandalous familiarity with a woman unbecoming the character of a minister of the gospel, expressly denying fornication or indecent familiarity. This was reported to the Presbytery, and on Feb. 1, 1870, complr. at the bar pleaded guilty to the charge of scandalous familiarity as libelled. The Presbytery, by a majority, received the complr.'s acknowledgment without proceeding further in the prosecution of the libel, suspended him for six months, and admonished him, and fixed the amount to be paid to an assistant. A petition was presented to General Assembly in May, 1870, by five elders of the parish of Auchtergaven, who had not appeared in the proceedings before the Presbytery, praying the General Assembly to take the judgment of the Presbytery into consideration. After various proceedings, and after hearing parties, the General Assembly, on 30th May, found "that the proceedings of the Presbytery, in accepting a certain acknowledgment by Mr Wight as a confession of guilt, and in sentencing him to punishment thereupon, without disposing of the charges in the libel which they had served on Mr Wight, to both of which Mr Wight pleaded not guilty, were, on the face of the said proceedings themselves, irregular, contrary to the laws and practices of the Church, and altogether null and inept, ordained the said Presbytery now to proceed forthwith in the discharge of the duties undertaken by them in beginning the said process against a minister of the gospel, and that in conformity to the laws of the Church," and reserved to complr. "his whole objections and pleas to the said libel, or such other proceedings as the Presbytery may adopt." Complr. prayed that this judgment be suspended, and interdict granted against the Presbytery proceeding to re-open the process of libel. On the ground that the proceedings before, and the sentence of, the Presbytery were at an end and final; that he had suffered nearly the whole of the punishment imposed, and that no man was bound to thole an assize twice; that the elders on whose petition the General Assembly proceeded were not parties to the libel before the Presbytery, and made no appearance there; that there was no process before the General Assembly; and that the judgments and proceedings of the General Assembly were in excess of their jurisdiction, grossly irregular, and contrary to the laws and constitution of the Church.

The L. O. (Mackenzie) refused the note, observing that he was not aware of any authority for holding that the General Assembly exceeded their jurisdiction in the matter complained of. There had been no excess of

powers or disregard of statutory provisions. The whole matter was within the jurisdiction of the Church Courts, and if so, then the only other question was, whether or not the General Assembly proceeded correctly, and acted rightly in sustaining the competency of the petition of the elders, and in pronouncing judgment on such petition. The L. O. considers this a question of ecclesiastical law and procedure, of which it was the exclusive province of the General Assembly to judge, and with which the Court of Session had no right to interfere. It would simply be reviewing the proceedings of the Supreme Ecclesiastical Court in a matter and in procedure purely ecclesiastical. Further, the judgment of 30th May reserved the complr's. whole objections and pleas. If the law and practice of the Church be as stated by complr., he will have an opportunity of stating it to the Church Courts, who have the sole cognisance thereof (*Campbell v. Presb. of Kintyre*, Feb. 21, 1843, 5 D. 657; *Lockhart v. Presb. of Deer*, July 5, 1851, 13 D. 1296; *Patterson v. Presb. of Dunbar*, March 9, 1861, 23 D. 720).

The complr. reclaimed.

The LORD JUSTICE-CLERK had no doubt at all. That there was bare ground for saying that the complainer did thole an assize he could scarcely doubt. The Presbytery charged him with indecent and scandalous familiarity; that was to say, familiarity with those aggravations; they departed from one of the aggravations—namely, the indecency; and, after dealing with him, accepted his confession, which did not need to be put in any technical way in a Church Court, of scandalous familiarity. They pronounced a sentence which had a civil effect, because it suspended him for six months, and compelled him to pay his stipend to an assistant, under Lord Belhaven's Act. Nobody appealed against that; and if he were to look at all into the practice of Church Courts, he should certainly have doubt whether a petition, at the interval of nearly six months after the pronouncing of the sentence, was a competent way of reviewing that sentence. But it was altogether unnecessary for the Court to pronounce any opinion upon that matter. He held that the jurisdiction of the Church Courts was just as statutory as the jurisdiction of the Court of Session. If he could look upon the Church Court as simply an analogous jurisdiction to a Justice of Peace Court, or any inferior judicatory of that kind, there would be a great deal more to say; but he did not think that was the law of this case. On the contrary, the Church Courts, within their ecclesiastical province, were just as supreme as the Court of Session. Seeing, therefore, that the Church Court had considered the matters in question, and passed a sentence which was within their sphere, and according to their own rules as they had interpreted them, the Court of Session had no power to interfere.

LORD COWAN was of the same opinion. Before reaching the propriety of the remit to the Presbytery to proceed by libel, it was necessary to get over the preliminary findings in the Assembly's resolution—that the proceedings in question were irregular, contrary to the laws and practice of the Church, and altogether null and inept. He repudiated the idea of a Civil Court being entitled to overrule a deliverance of the Assembly in matters of that kind. The Assembly were supreme for questions that came legitimately and regularly before them—just as much so as the Court of Justiciary. Both Courts stood upon statute. The Court of Session had no right to interfere with judgments of the Court of Justiciary; neither, he apprehended, when the Assembly kept within matters of ecclesiastical law and procedure,

had the Court of Session power to interfere with the deliverances of the Assembly. It might be that incidentally and necessarily the civil interests of the clergyman, or those who were made subject to procedure, might be affected. Every judgment pronounced by the Assembly in reference to a *fama* against a minister had necessarily that effect; but because the civil interests of the man who was found guilty of an offence leading to deposition or suspension should be thereby affected, was that any reason for the Civil Court interfering? By no means. He refused to consider whether the proceedings were regular or not, and confined himself to saying, as the ground of his judgment, that they had no jurisdiction to review the proceedings of the Assembly.

Lord BENHOLME—The maxim of not tholing an assize twice was very well known in the Criminal Court. But he found no such case here. How could it be said that a man tholed an assize twice when he had not been tried at all? It might be said he had been tried already, or at least that he had confessed in a qualified manner to one of the charges; but upon the main and graver charge he had never tholed an assize, or anything analogous to an assize. He pleaded not guilty, and it had not been determined by the Presbytery whether he was or was not guilty. In these circumstances, the Assembly were of opinion, and he could not say he differed from them, that there had been a total departure from the duty of the Presbytery in not going on with and exhausting the libel; and accordingly, although there was no regular complaint or appeal, they might exercise their supereminent jurisdiction in finding that the Presbytery had proceeded irregularly in quashing the proceedings, and remitting to the Presbytery to exhaust the libel. Could it be said that this was irregular, or that there was any case here of a man being tried twice? He thought it was merely securing that the man should be tried once. Therefore the strength of the case, as involving a double trial, failed, he thought, entirely. If the case had been more doubtful than it was upon the facts, he believed he should have concurred in the opinion that the Court had no jurisdiction. Within their own department, in the trial of ecclesiastical offences, the law of the land gave the Assembly an exclusive and a final jurisdiction. He thought the whole constitution of the Assembly stood upon statute as well as the constitution of the Court of Session or the Court of Justiciary. The whole constitution of the Assembly appeared to him to render them independent of any interference at the instance of the Court of Session within their own jurisdiction. They might do injustice, but they did it under their own constitution, and the Court of Session had no right to interfere with that which they did within their own jurisdiction. In the present case, he could not say that he could see any injustice at all, or that they had done more than redress what appeared to them, and what appeared to him, a very irregular proceeding on the part of the Presbytery.

Lord NEAVES was not prepared to say that there might not be proceedings of the General Assembly which the Court of Session might interfere with. If the Assembly sustained a sentence deposing a man for praying for the Queen, he should be inclined to say that was so outrageously unconstitutional that the Court might interfere. But when they were dealing with matters of mere procedure in a matter purely ecclesiastical, the Court had no power. They were not the judges of ecclesiastical proceedings. Ecclesiastical proceedings were very anomalous altogether. The prosecutor and the judge were the same. That had always been the ecclesi-

astical law ever since there was any constitution. The Inquisition was both prosecutor and judge, and all Church Courts were more or less inquisitorial. They began by accusing a man upon a *fama clamosa*; they decided whether there was a *prima facie* case for inquiry; and after that the party was libelled; and a great deal took place that the Civil Court could not judge of, and were not entitled to interfere with. Therefore he thought that, in the present case, nothing had been shown on which the jurisdiction of the Court of Session could be sustained. But, at the same time, he thought the case had completely broken down, in the way in which Lord Benholme had explained, upon the substance of it. He could not say that it was tholing an assize that a charge against a man was abandoned by the prosecutor's not proceeding with it. On the matter of the fornication, it neither came to guilty nor not guilty. The accused pleaded not guilty, and there the matter dropped. As to the other charge, he concurred with the Assembly. It would appear that the law, ecclesiastical or other, had not got into full observance in the Presbytery of Dunkeld. For what was done by that Court? A libel was brought forward containing two charges—the one, fornication; the other, indecent and scandalous familiarity by a minister of the gospel with a woman, to the disgrace of the sacred profession. The relevancy was objected to, and the libel was found relevant; that was to say, the indecent and scandalous familiarity was found relevant. The Presbytery then proceeded to commune with the accused. He denied the fornication entirely; he denied also the indecency, on soul and conscience; but he said he was willing to confess to scandalous familiarity. The word "scandalous," as often used in common conversation, was a vituperative epithet; but, looked at strictly, it merely meant a thing that led others to stumble. Now, whether a scandalous familiarity, which was innocent and devoid of guilt, formed a relevant charge, he could not take upon him to say: it certainly was not found so; it was essentially a different charge that was found relevant. An innocent familiarity with a woman that led to scandal or offence to some weak brother or sister standing by, was a very different affair from an indecent and scandalous familiarity. Now, it was to the modified charge that the accused was willing to plead in a kind of way, and the Presbytery took that plea; allowed the charge to be docked down to that, without a new interlocutor of relevancy; and so the whole thing was got rid of, and sentence pronounced. Now, he must say, when that was noticed by any person interested in the parish, it was competent for the Assembly to go back and revise the procedure. He for one should have concurred in holding, if canon law was the same as civil law, that the Presbytery's sentence was null and void—that the plea on which it proceeded was null and void. A plea to part of the charge, denying the indecency, and merely pleading to the scandal, was what, in the Criminal Court, would have been regarded as a plea of not guilty. And yet upon such a plea the accused was sentenced. He thought such a sentence was rightly set aside. With regard to tholing an assize, he did not think the complainer tholed an assize on either of the charges. If he had suffered, he had suffered by a null sentence, which by appeal he could have got rid of. In any aspect of the case, it seemed plain that there were no grounds for interference on the part of the Court.

The Court adhered unanimously to the judgment of the L. O.

BANK OF SCOTLAND v. FAULDS.—July 8.

*Bankruptcy—Composition Contract—Bill—Preference.—*Action against a wright and waggon-builder, in Glasgow, concluding for £1732 3s 6d, contained in a promissory-note by defr., dated 28th July, 1862, payable thirty months after date, to Rowan & Co., iron merchants, Glasgow, and blank endorsed by them, with interest at five per cent. from 31st Jan., 1865. In July, 1862, defr. entered into a private arrangement with his creditors that they should accept 7s 6d per pound, payable by bills at nine, eighteen, and twenty-four months, and whereby an additional composition of 2s 6d per pound was made payable, provided a committee of defr.'s creditors appointed for the purpose should at the end of twenty-four months determine that he should pay the same. In respect of this composition arrangement defr. was formally discharged on 19th Nov., 1852, and subsequent dates, subject to the creditors' right to the additional 2s 6d per pound in the event of its being determined by the committee of creditors that the same should be paid. The committee ultimately determined that the additional 2s 6d should not be paid. The body of creditors received nothing beyond the composition of 7s 6d per pound from the estate. But between the meeting of creditors when the composition was agreed to, and the date of the formal discharge above referred to, defr., at the request of Rowan & Co., his largest creditors, and parties to the composition, granted them the promissory-note libelled, which was in the following terms:—"Thirty months after date, I promise to pay to Rowan & Co., or order, within the office of the Bank of Scotland, £1732 3s 6d sterling (being my extra contingent 2s 6d per pound with interest) value received." Rowan & Co. discounted the note with the Bank of Scotland, who, it came to be conceded, were, through their agents, cognisant of the whole circumstances. The defence maintained was—(1) That the obligation in the note was contingent upon the 2s 6d per pound being found payable; (2) that if not contingent, as it was meant to be, it constituted an illegal preference.

The L. O. (Ormidale), after proof, repelled the defences, and decerned in terms of the summons, holding that the promissory-note was not in itself contingent, and that pursuers were not in the knowledge of any agreement or understanding that it should be so; and further, that there was no illegal preference, in respect that the composition arrangement had been formally agreed to before the promissory-note in question was granted or promised.

The Court (L. Neaves diss.) altered, and held that the note, having been granted before defr. was formally discharged, it, in fact, operated as an illegal preference, and could not be enforced. L. Neaves agreed with the L. O.'s view, but proceeded very much upon the structure of the record, and the absence of any averment of illegal preference, the plea on that ground being added in the Inner House. Defr. was only found entitled to expenses from the date of the L. O.'s interlocutor.

Act.—Millar, Deas. Agents—Tods, Murray, & Jamieson, W.S.—Alt.—Watson, Paterson. Agents—J. & A. Peddie, W.S.

(Before Seven Judges.)

SMITH CUNNINGHAME'S v. ANSTRUTHER'S TRUSTEES.—July 12.

*Marriage-Settlement—Power of Apportionment—Liferent and Feu.—*The questions depended on the construction of the marriage-settlement of Mr and Mrs Smith Cunninghame. Mrs Cunninghame's father and mother, the late James Anstruther, W.S., and Miss Marian Anstruther (his cousin)

were married in 1828. By ante-nuptial contract, Mr Anstruther settled £4000 on himself and his wife, and the survivor in conjunct-fee and liferent, and on the children of the marriage and their issue, whom failing, his own nearest heirs and assignees in fee, reserving to him, whom failing to his wife, a power of apportionment; and failing such power being exercised, the £4000 was to be equally divided. This was declared to be in full of legitim and all other legal provisions. By the same deed, Miss Anstruther conveyed in favour of herself and her intended husband, and the survivor in conjunct-fee and liferent, and the children of the marriage and their issue, whom failing to her own nearest heirs and assignees in fee, all property then belonging to her, or that should pertain and be owing to her, during the subsistence of the marriage. With regard to this, there was the same reservation of a power to the spouses or the survivor to apportion, failing the exercise of which the children were to take equal shares. At the date of the marriage Mrs Anstruther's property was worth £8000. By the death of her nephew, Sir John Anstruther, she afterwards succeeded to upwards of £50,000. Three children were born of the marriage—Mrs Smith Cunninghame, Mrs Mercer, and Lucy Sarah, who remains unmarried. In 1847, Mr and Mrs Smith Cunninghame entered into an ante-nuptial contract, to which Mr and Mrs Anstruther were parties. Mr and Mrs Anstruther paid over £5000 to the marriage-contract trustees, to be invested for behoof of the spouses in liferent, and their children, and the issue of their children, in fee, which sum, the marriage contract bore—“Is hereby declared to be, and the said Maria Anstruther hereby accepts of the same, in full satisfaction of all legitim, portion natural, or bairn's part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March, 1828, as the share or division hereby allotted to her of her said father and mother's property, and settled by said contract, all which claims are hereby settled accordingly, saving always and reserving to the said Maria Anstruther the goodwill of her said father and mother as accords.” Mrs Mercer, at her marriage in 1861, executed a similar marriage-contract, to which her father was a party, her mother being then dead. Mr Anstruther, in 1866, contracted a second marriage with Miss Annabella Agnes Anderson, in contemplation of which he executed a trust-disposition and settlement, directing the investment of £20,000 for behoof of his unmarried daughter Lucy Sarah, which she, as a party to the trust-deed, accepted as in full of all claims she might have for legitim, or in any other manner or way through his death, or through the marriage contract of 1828. By the same deed Mr Anstruther settled £30,000 on his second wife in liferent, and the children of the marriage in fee, whom failing to his own nearest heirs and assignees; and declared his daughter Lucy his sole heir, to the exclusion of his other two daughters. Mr Anstruther died in 1867, leaving no issue of his second marriage.

Mr and Mrs Smith Cunninghame brought this action against Mrs and Miss Anstruther, and against Mr Anstruther's trustees, concluding for a separation of Mr Anstruther's funds from those of his first wife, in order that the latter might be equally divided among the children of the first marriage, in terms of the marriage-contract; for declarator that there had been no valid apportionment either of the mother's estate or of the £4000;

and that the pursuers were entitled to one-third of the provisions contained in the contract of marriage; also for reduction of the pursuer's marriage-contract, and of Mr Anstruther's trust-deed of 1866, so far as they might be held to exclude their claim. In support of the reductive conclusions, the summons contained allegations of fraud, and also of essential error on the part of the pursuers when they executed their ante-nuptial contract.

The Court, on March 18, 1869—the Lord President being absent—held that under the destinations of 1828, the fee of the £4000 was in the husband, and that of the wife's property in her; but that the right of the children under that deed could not be gratuitously defeated by their parents. With regard to the other questions raised, the Court held—Lord Deas dissenting—that the pursuers were entitled to a proof before answer in regard to the circumstances connected with the execution of their own marriage-contract. Lord Deas was of opinion that it was unnecessary to decide which of the spouses had the fee, because, whichever of them had the fee could only appropriate the whole fund to the three children, in shares equal or unequal; that the marriage-contract of 1847 imported a full discharge of Mrs Smith Cunninghame's rights under the marriage-contract; that the benefit of that discharge accrued entirely to Lucy; and that, in the absence of challenge by her, the trust-deed of Mr Anstruther in 1866 was effectual. In regard to the reductive conclusions, his Lordship held that there were no relevant allegations to go to proof.

The proof having been led before Lord Deas, the case was heard; and, in consequence of a division of opinion, was afterwards argued before the Judges of this Division, and three Judges of the Second Division, and was advised to-day. With regard to the allegations remitted to proof, the Court was unanimously of opinion that the pursuers had failed to establish these allegations.

The LORD PRESIDENT held that the terms of the clause of discharge in Mrs Smith Cunninghame's marriage-contract were clear and explicit. If all the children had concurred in it, the parents might have disposed of the estate; but the discharging child had no interest in the effect of the discharge upon the other children, though the argument had proceeded a good deal on that footing. After the discharge, the *universitas* of Mrs Anstruther's property remained secured to Mrs Mercer and Miss Lucy Anstruther; on the mother's death, the fee passed to them jointly, subject to their father's life-rent and right of apportionment; and Mrs Smith Cunninghame had no further interest in her mother's estate. Defrs. were entitled to absolvitor.

Lord COWAN concurred.

Lord DEAS concurred, being of the same opinion as he expressed at the former advising.

Lord NEAVES held that a power of apportionment must be honestly exercised, although the greatest freedom in the mode of making the apportionments must be allowed. Here it had been exercised so as to give £5000 to one child, £5000 to another, and £20,000 to a third, leaving the rest to the personal uses of one of the parents. That was not a good proportionment. If the discharge was to be founded on as the basis of the defence, it was necessary to understand what it was. It was not enough for Mrs Smith Cunninghame to give up her rights without knowing to whom. The balance after that discharge was held for the children as a class. Did it then operate to extinguish her existence, so far as the marriage-contract was concerned? This was not the intention of the parties. It would not tie up the parents' hands, and invest the other two children with

an indefeasible right. The other daughters were not parties to it, and there was no intention to give them a *jus quæsitum tertio*. The reservation of goodwill showed that it was contemplated that the parents might add to her share by subsequent apportionments, and the discharge did not destroy the power of further apportionment. The apportionment was good so far, and the remainder should be equally divided.

LORD ARDMILLAN held that no apportionment had been made by Mr and Mrs Anstruther, so that equal division must necessarily result. The whole fund never was divided. A bargain had been made with Lucy; but the provision to her was neither in form nor in substance an apportionment out of her mother's estate. As to the discharge, his Lordship could not hold Mr Anstruther entitled to take to himself indirectly the benefit of the discharge obtained from his other daughters. His Lordship held that as there was no valid apportionment, an equal division of the whole of Mr Anstruther's estate among the children of the marriage must take place.

LORD KINLOCH delivered an opinion in favour of pursuers, and Lord Benholme in favour of defra. There was thus a majority of one in favour of defra. Absolvitor.

Act.—Watson, Shand. *Agents*—Hamilton, Kinnear, & Beatson, W.S.
—Alt.—Sol.-Gen. Clark, Balfour. *Agents*—A. & A. Campbell, W.S.

ORR'S TRUSTEE v. TULLIS.—July 12.

Bankruptcy—Reduction—Sale of copyright and plant of newspaper—Possession of moveables.—Reduction by the trustee on the sequestrated estate of J. C. Orr, sometime proprietor of the *Fife Herald*, to set aside certain deeds whereby the copyright, plant, etc., of the *Herald* were transferred to Tullis by Orr in 1863; or declarator that the subjects in question had never been validly transferred to Tullis, and fell under the sequestration of Orr. Orr held the copyright, and himself printed and published the paper, carrying on his business in premises rented from defr. In 1863, he got into embarrassments, and entered into an arrangement with defr., whereby he sold to the latter, subject to certain powers of redemption, the copyright and whole printing plant on the premises, and agreed to renounce his lease of the premises, and take a new lease of the premises, copyright, and plant. Orr continued in possession under this arrangement till 1869, when he became bankrupt, and his trustee then brought the present action, in which he pleaded, in the first place, that the transaction was simulate, and not a *bona-fide* sale; and, in the second place, that, at all events, defr. had never obtained possession so as to vest him with the property either of the copyright or plant.

The L. O. (Gifford), after proof, found that the whole arrangement had been honest and *bona-fide*, and that as regarded the copyright, there had been an effectual transfer of the property; but his Lordship held, as regards the plant, that there had never been delivery, and, therefore, that the plant fell under the sequestration.

Defr. having reclaimed, the Court altered the L. O.'s interlocutor so far as unfavourable to the defr., and held that defr., being landlord of the premises in which the plant was, and Orr having, from the date of the arrangement, possessed the plant in a new character and under a new title, there had been a sufficient change of possession to amount to constructive delivery. Absolvitor.

Act.—Fraser, Rhind. *Agent*—Robert Menzies, S.S.C. *—Alt.*—Miller, J. C. Smith. *Agent*—J. D. Bruce, W.S.

MACLEOD v. POLICE COMMISSIONERS OF TAIN.—July 14.

Property—Interdict.—Susp. and interdict brought by Macleod of Cadboll for the purpose of interdicting the Police Commissioners of Tain from making a drain through a portion of the complainer's property known as the "Hangman's Rigg," for discharging sewage into a ditch running along a road claimed by complr. as a private farm road. Complr. contended that the ditch in question was an ordinary roadside ditch and his private property, and that therefore the Police Commissioners had no power under their Acts to introduce sewage into it. But complr. further contended that in any view respts. were not entitled to execute the works complained of at their own hand and without going before the Sheriff under the General Police Act, or the Public Health Act, or in some way obtaining competent judicial authority. Respts. maintained that the proceedings complained of were warranted by the Public Health Act; and disputed complr.' right to the ditch in question, maintaining that the same was truly one of the public sewers of Tain, and had been used as such from time immemorial.

After proof, chiefly in regard to the character of the ditch, the L. O. (Mure) granted interdict until respts. had gone before the Sheriff under the statutes referred to. His Lordship also expressed an opinion favourable to complr. upon the proof.

Respts. having reclaimed, the Court adhered in substance, interdicting the operations until judicial authority should be obtained. The Lord J. C. and Lord Cowan were further of opinion that complr. had made out his case in regard to the character and ownership of the ditch.

Act.—Sol.-Gen. Clark, Mackintosh. *Agents*—Mackenzie & Black, W.S.
—*Alt.*—Fraser, Watson. *Agents*—Murray, Beith & Murray, W.S.

DALL v. DRUMMOND.—July 15.

Bankruptcy—Private Trust—Commission of Trustee—Sequestration.—Pursuer was trustee under a private trust by William Moreland for behoof of his creditors in Sept., 1867. Eventually Moreland's estates were sequestrated; and after competition between pursuer and defr. for the office of trustee, defr. was elected. No confirmation was taken for some time; and in the meantime no judicial factor was applied for. Till confirmation of defr. was granted, pursuer continued to act on pursuer's behalf, and various meetings of the creditors meanwhile took place. By the trust-deed constituting the private trust, it was declared that pursuer should receive remuneration for his trouble. The L. O. (Mure) held that pursuer was entitled to act till the confirmation of defr., and to commission for his trouble. Defr. reclaimed, but the Court adhered.

Act.—Sol.-Gen. Clark, H. Smith. *Agent*—T. Whitehead, S.S.C.—*Alt.*—Marshall, Maclean. *Agent*—T. Wallace, S.S.C.

OUTER HOUSE.

(Before Lord Mackenzie).

M.P.—POLLOCK AND ANOTHER (STRANG'S TRUSTEES) v. METEYARD
AND OTHERS.

Heritable and Moveable—Election—Trust.—The main questions raised in this multiplepointing were (1) whether a sum of £1500 contained in a mortgage on the security of the works and rates of the Glasgow Water Company was heritable so far as regarded the rights of the widow, who was a claimant, and fell to be deducted from the fund *in medio* before she could claim her *jus relictæ*; (2) whether in consequence of certain of the beneficiaries electing to take their legitim instead of their liferent rights under the trust disposition that operated in favour of the residue which was by the deed burdened with the liferent; and (3) whether, in respect of the terms of the said deed, the trustees, as tutors and curators under it, were entitled to receive the whole residue remaining after payment of *jus relictæ* and to hold the same for behoof of the respective issue of the truster's three children, and to manage the same during their respective pupillarities and minorities, subject to the provisions and directions of the trust-disposition. The Lord Ordinary (Mackenzie) held, and his judgment has been acquiesced in, that the sum of £1500 was to be regarded as heritable, and therefore not subject to the *jus relictæ*; that the forfeiture of the liferent rights of certain of the beneficiaries operated in favour of the residue, and that the trustees were entitled to receive the whole residue after certain payments, and to hold the same for behoof of the respective issue of the truster's children.

Counsel for the Trustees—Brand. Agent—W. S. Stewart, S.S.C.

Counsel for the Widow—Campbell. Agent—John Walls, S.S.C.

Counsel for Mr and Mrs Meteyard and others—Scott. Agents—Messrs Campbell & Smith, S.S.C.

HOUSE OF LORDS.

CITY OF GLASGOW UNION RAILWAY COMPANY v. HUNTER.—June 30.

(In the Court of Session, Jan. 22, 1869, 7 Macph 409).

Railway—Compensation for Vibration.—Reduction by the City of Glasgow Union Railway Co. of a verdict assessing the sum payable to Hunter, spirit merchant, proprietor of houses and shops in Eglinton Street, Glasgow. The railway company required to take part of Hunter's property, consisting of back ground, together with some temporary erections thereon, standing behind his houses and shops in Eglinton Street. The railway did not come nearer than twenty-eight yards to the back of Eglinton Street, and did not go towards the front of the street. Mr Hunter claimed a sum for damage done to the houses in Eglinton Street, owing to the vibration and other inconveniences of having the railway so close to the houses. The jury assessed the damages as follows:—"For property taken, £1270; for the compulsory purchase thereof at 10 per cent., £127; for damage to the remaining property caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway, £392." The company contended that this finding of the jury was *ultra vires*, and

null and void in two respects—first, because the jury gave a sum of 10 per cent. for the compulsory purchase; and, secondly, because they gave a sum for damage caused by vibration, noise, smoke, and other consequences of the railway. The L. O. (Mure) held that the jury were wrong in giving 10 per cent. as compensation for the compulsory purchase, but that the other items were right. The First Division recalled the L. O.'s interlocutor, and held that the verdict was right in all the items. The company then appealed to the House of Lords.

Appts. contended that whatever may have been thought to be the law at the time of these judgments in the Court of Session, it had been subsequently settled by the House of Lords in *Brand v. Hammersmith Ry. Co.* 38 L. J. Q. B. 265, that the owner of houses could not recover any compensation from the railway company on the ground of vibration, smoke, and noise. Respt. contended that though it was true the House of Lords had now decided that noise and vibration were no ground for compensation to any owner no part of whose lands was taken from him, still it had not yet been decided that if part of his land has been taken, he has not a right to recover compensation for damage on that ground to the rest of his property.

LORD CHANCELLOR (Hatherley) was clearly of opinion that the case was completely covered by the Hammersmith railway case. Damage for which compensation could be given must be damage sustained in the execution of the works, not from the exercise of the powers vested in the company by the General Lands Clauses Act and their special Act. The sum assessed in that respect must therefore be deducted from the amount of the verdict, without prejudice, however, to any claim respt. might be advised to make in respect of damage by the construction of the railway bridge, by the abstraction of light and air from his other property. Interlocutors varied.

EARL OF ZETLAND *v.* GLOVER INCORPORATION OF PERTH.—*June 30.*

(In the Court of Session, Jan. 31, 1868, 6 Macph. 292).

Property—River.—The question arose out of the existence of a sandbank in the river Tay, where the parties have rights of salmon fishing *ex adverso* their respective properties of Balmbrich, on the south side belonging to appt., and Seaside on the north belonging to respts. The sandbank having at low water become an accretion to the south bank of the river, and both parties being entitled to fish *ad medium filum aquæ*, appt. contended that the centre of the river should be measured from the northern edge of the sandbank. Respts. insisted that the centre of the river must be determined by reference to the permanent banks of the river at high water, where the sandbank disappeared, and formed no actual impediment in this to navigation or the exercise of salmon fishing.

Their Lordships, having regard to the facts fully established in evidence that the sandbank was a shifting bank and covered to some depth at high water, were of opinion that appt. had made no case for the interference of the Court, and his appeal should be dismissed, with costs.

CALEDONIAN RY. CO. *v.* SIR W. CARMICHAEL.

(In the Court of Session, March 26, 1868, 6 Macph. 671).

Railway—Jurisdiction—Lands Clauses Act 1845—Interest.—The question was whether the Court of Session had jurisdiction to entertain an

action for compensation assessed by a Sheriff's jury, for the value of stone under the surface of land belonging to respt., which the company declined to allow him to work; and whether, assuming that the action was well brought, it was competent for the Court to decree interest on the sum assessed by the jury, or determine anything as to the payment of expenses incident to the trial before the Sheriff. Appta. contended that the only proper mode of proceeding was to ascertain before the Sheriff the value of the stone, as in an ordinary case of compensation under the Lands Clauses Act; and as interest had not been awarded by the jury, they were not liable for it before the day when the amount was found due. The amount tendered being larger than that awarded by the jury, appta. further contended that they were entitled to one-half of the expenses before the Sheriff.

Their Lordships were of opinion that the interlocutor of the Sheriff ought to have been treated as final; but it was brought under review. The L.O. held the action in the Court below competent, and the Court of Session adhered to the interlocutor now complained of. Now that action, if maintainable, must be founded entirely on the proceedings before the Sheriff. It did not, however, merely enforce the satisfaction of the verdict, but added to it that which the jury had no power to give, or, having the power, did not give. The tender of the railway company was £7000, and the verdict of the jury was for £5275, respt. being liable for one half of the expenses. The Court of Session, however, added interest from 1852, when the Company took possession, to the amount found by the verdict of the jury, thus increasing the amount beyond what had been tendered, and found the company liable to the whole expenses. Their Lordships held that the action was incompetent, and reversed the interlocutors complained of, with absolvitor, except so far as they granted decree for the principal sum, with interest from 1864, when the compensation was assessed by the jury.

LESLIE v. M'LEOD.

(In the Court of Session, Feb. 21, 1868, 6 Macph. 445).

Succession—Marriage Contract—Heir—Provision to younger children.—By ante-nuptial contract between the late Mr Leslie of Dunlugas, in 1820, and Mrs Mary Ramsay or Brebner, which was afterwards carried out by a post-nuptial contract. Mr Leslie bound himself to convey the estate of Dunlugas to himself and the heir-male of the marriage in fee, and also to secure to the younger children of the marriage £16,000. Mr Leslie died in 1856, leaving one son, the appellant, and one daughter, who had married, the respondent. The estate of Dunlugas was valued at £28,000, and there was only about £1500 of personal estate. At the time of the death it was not known that the marriage contract had been entered into, and the deceased, Mr Leslie, had left a trust-disposition, whereby, among other things, he left £5000 to Mrs M'Leod and her children. That sum was paid accordingly, but afterwards it was discovered that there had been a marriage contract, and the heir-at-law reduced the trust-disposition on the ground of death-bed. Thereupon the question came to be, what was the construction of the marriage contract. Mr M'Leod, as representing his deceased wife, claimed from the appellant payment of the sum of £16,000 in full, on the ground that she was a creditor of the father to that extent, and that appt. was bound, as representing his father, to pay it. Appt. contended that he was not liable, or, at all events, if he was liable, he was a creditor of his

father's estate in the same sense that his sister was, and therefore the proceeds of the estate must be divided in the proportion of £16,000 to £28,000. Respt. having raised an action against appt., the L. O. held that Mrs McLeod did not take a preferable right to appt., but both were entitled to prove against the father's estate for their respective provisions. The First Division reversed, and held that appt. was bound to pay the whole £16,000 to the respts. Thereafter the point was raised, whether in payment of the £16,000 appt. was entitled to deduct the £5000 already paid to respts. under the trust-disposition. The First Division held that the £5000 must be deducted from the £16,000. There was an appeal and cross-appeal upon these judgments.

The LORD CHANCELLOR said—The whole case turned on the single sentence in the settlement of the testator. The contract of marriage between the late Mr Leslie and his wife was dated in 1820. After the death of Leslie, the heir-at-law served himself as heir-general; and, in the first instance, the settlement of 1820 was lost sight of, and was in fact mislaid; but that difficulty was got over, and the deed provided that the settler bound himself to convey the estate of Dunlugas to himself and the heir-male of the marriage in fee, and also to secure to the younger children of the marriage £16,000. The question, therefore, had arisen in a somewhat general form—namely, whether, when the owner of an estate in fee simple, by his marriage contract, disposes the estate to himself for life, and to the heir of the marriage in fee, and at the same time binds himself to pay the younger children a fixed sum, such as £16,000, and there is no personal estate to pay that sum at his death, the heir of the marriage is nevertheless bound to pay it in full; or whether he is entitled to treat it as a debt, ranking on an equal footing with the value of the estate considered as a debt to himself, and apportion the debt payable only in proportion to the value of the estate. It is argued that the intention of the settler must be given effect to, and that the latter construction is the proper way of doing so. The settler had not expressly charged the estate with the £16,000, and therefore the point was somewhat wide. The conclusion arrived at in the Court below was right. The reason given was intelligible; for what the heir of the marriage really gets under such a settlement is merely the inheritance. He takes the estate as heir, and, therefore, subject to the debts which the original owner of the estate was bound to pay. The father had created the burden of £16,000, and would have been bound to pay it, and so the heir is equally bound to do so. It was argued that because the same deed which gave the sum of £16,000 to the younger children also gave the estate to the eldest son, and that the one debt was as good as the other; but that seemed to be founded on this fallacy, that the settler gave to the eldest son the estate itself, whereas what he did give was only the right to the estate after paying the debts. This debt of £16,000 was just as much payable by the heir as any other debt of the father; and though it happened in the present case that the younger children would get a much larger provision than the heir of the marriage, this was no reason for altering the construction. It was said, if the settler had thought that there would be no personal estate left to pay his debts, he would have provided for an apportionment; but that was no sound argument, for very likely he never thought of such a contingency at all. He was at the time of the settlement in the same position as any other wealthy testator, whose property differs very much at the time of his death from what it was when he made the disposi-

tion. There was nothing in the case to justify the view taken by Lord Deas that the gift to the heir was merely a *designatio personæ*, and not intended to represent his liability. The other point which remained was whether appt. was entitled to deduct from the £16,000 the sum of £5000 already paid. The latter sum was no doubt paid in ignorance of the contract of marriage, and every consideration of justice required that it should be computed as part payment of the total sum of £16,000 which that contract provided, and thus that the balance only of £11,000 was now payable by the appellant. The result was, that the main appeal would be dismissed, and the cross appeal would also be dismissed.

Lord WESTBURY concurred. The case very well illustrated the difference of the views taken by the law of Scotland and the law of England in reference to the construction of marriage contracts. In England under a deed of this kind the heir would take as purchaser or singular successor; whereas in Scotland it was held that the heir took only as heir—that is to say, he took the succession of the estate burdened with the debts of the settler. In Scotland it was clear from the authorities that all that the heir took was the right to have the estate after the debts were paid, and he had not the absolute right to the estate itself, for the father in his lifetime might burden it with further provisions in favour of the second family of children. That being so, the debt of the younger children was not on an equality with the claim of the heir, who was rather in the position of a residuary legatee. Hence the reasoning of appt. was founded on the essential fallacy that the heir was entitled to the estate, whereas he was only entitled to have such portion of the estate as remained after paying the debts of the father. It might be regretted that in this particular case the application of the rule led to unfortunate consequences; but the rule was well established. As to the payment of the £5000 under the trust-disposition, respt. was not entitled to keep that sum as well as claim the £16,000, for he who seeks equity must do equity, and he cannot be permitted to reach the one sum through the agency of the Court without first giving a discharge for the other sum already paid.

Lord COLONSAY concurred.
Affirmed without costs.

FRASER v. CRAWFORD, &c.—June 4.
(Not reported in Court of Session).

Submission—Arbiter.—Reduction by appt. of a decree arbitral as to price of house in Glasgow bought by Fraser from Connell, an accountant in Glasgow. The house was not finished in May, 1858, when Fraser entered, and he had to do parts of the unfinished work. He declined to pay the balance of the price, and the matters in dispute were referred to Bell, before whom certain proceedings took place. In the result Fraser claimed to deduct from the price a sum of £85, being for work paid for by him, but which Connell ought to have done; and a sum of £200 for penalties incurred by Connell for non-completing the house in the time stipulated. The arbiter found that Fraser was entitled to be paid for completing the unfinished work, but that there should be set off against that sum, extra work executed by Connell, and that Fraser's claim was counter-balanced by the latter. He ordered Fraser to pay £80 to Connell. Fraser now alleged that no questions of extra work were included in the reference. Respts., who now represented Connell, maintained that the reference did include the claim for extra work, or at all events the parties acquiesced in the jurisdiction of the arbiter.

The L. O. (Ormidale) held that the decret arbitral must be reduced, that the point of extra work was not referred, and that no opportunity was given to Fraser to go into a proof on the subject. The First Division reversed.

The LORD CHANCELLOR (Hatherley)—The main question in the case was whether the claim set up by respt. for extra work was within the terms of the submission. The submission arose out of the building and completing of a house sold by Connell to Fraser, and all differences that might arise between the parties as to the finishing, or generally under these presents, were referred to Bell; and in the list of additional work, it was added that any further additions or alterations were to be paid for by Fraser. Now, this showed that Connell was not bound to pay for the extra work that might be done; and if he had executed such work, it was clear that he was entitled to be paid for it. The consideration of this extra work seems, therefore, to be within the submission.

Lord CHELMSFORD concurred. The value of the subject matter in dispute was £80, and it was lamentable to think of the enormous expense that had been incurred in these proceedings. There could be no reasonable doubt that the claim to extra work was competently entertained and disposed by the arbiter, and that appt. had an opportunity of objecting to it, and he now had to set aside the findings of the arbiter.

Lord WESTBURY—The clause for extra work was certainly included within the terms of the reference, which was comprehensive enough to include it. Nothing was more contrary to all principles of law than to allow parties who had agreed to refer their disputes to an arbiter to go afterwards to a Court of law, and attempt to take objections to the decision of the arbiter, on the ground of some irregularity in the proceedings. Courts will always, in such cases, give credit to the propriety of the proceedings before the arbiter. This litigation, after hanging on for some eight or nine years, had culminated in a point of very small value, and it would have only excited indignation in their Lordships' minds if it were not that such frivolous litigation occurs in these appeals from Scotland day after day. If the people of Scotland only knew the miserable slavery to which they were subjected by the carrying on of this class of cases, and by the state of the law which permitted of it, they would probably think of some remedy.

Lord COLONSAY concurred. Affirmed, with costs.

LORD ADVOCATE v. TRUSTEES OF DONALDSON'S HOSPITAL.—July 2.

Teinds—Valuation—Act 1707.—In a summons of augmentation, of the parish of Kinneff and Caterline, the Court of Teinds modified a stipend of 18 chalders, half meal, half barley, with £8 16s 8d for communion elements; and in the locality, the question was raised whether the teinds of Wester Barras, in the parish of Kinneff, belonging to the Governors of Donaldson's Hospital, had or had not been valued. This turned on the effect to be given to the following document:—"At Edinburgh, the third day of February, 1636, the lands of Wester Barras, pertaining to Sir John Douglas, are worth, and may pay in stock and teind, parsonage and vicarage, eight chalders victual. This is the just extract of the valuation of the foresaid lands, as is contained in the principal register thereof. Extracted by me, Thomas Murray, advocate, clerk-depute to Sir Archibald Johnston, of Wariston, knight, clerk of register, and keeper of the said registers. THOMAS MURRAY."—This document was duly recorded by the Court of Session in

1792, under the authority of an Act of Parliament, passed in 1707, for supplying the loss of certain records of the Court of Teinds by the registration of any authentic extracts from such records which might be presented to the Court of Session. The Lord Advocate objected that the above was not admissible evidence, for it did not purport that there had been any decree of valuation, and that the necessary parties had been called before it was pronounced. On the other hand, respts. contended that faith must be given to it, for it had been recorded by a competent Court in 1792, and must now be taken to be authentic. The L. O. held that the document was invalid. The Court, by a majority of 5 to 2, held that the document was valid and authentic as a recorded decree, and gave effect to it.

The LORD CHANCELLOR (Hatherley) had no doubt that the majority of the Court below had come to a correct conclusion in holding the document, which had been accepted and recorded as authentic in 1792, as a valid and binding valuation on all parties, and that all the presumptions of law must be made in favour of a document of such antiquity. The appeal must therefore be dismissed with costs.

Lords WESTBURY and COLONSAY concurred.

Affirmed, with costs.

Act.—Advocatus, M'Lennan.—Alt.—Sir R. Palmer, Decanus.

COMMRS. OF SUPPLY OF LANARKSHIRE *v.* NORTH BRITISH RAIL. CO.

—July 11.

(In the Court of Session, Dec. 10, 1868, 7 Macph. 201).

Public Burdens—Prison and Police Rates—Railway—Exemption.—Declarator by the respts. that the company was exempt from certain assessments made by the defrs. upon them. The Monkland and Kirkintilloch Railway Act, passed in 1825, expressly provided that the lands conveyed to the company should not be liable for land-tax, nor any public or parish burden. The Slamannan Railway Act, passed in 1835, also provided that the grounds should not be liable in payment of cess-tiend, schoolmaster's salary, or other public or parochial burdens, but the same should be paid by the original proprietors of such grounds. These railways now belonged to the N. B. Ry. Co. Notwithstanding these exemptions, the Commissioners of Supply had made an assessment on the railway company for prison and county police purposes. Defrs. contended that these taxes were leviable by virtue of the Valuation of Lands Acts and the Prisons (Scotland) Act, which extend to all lands and heritages, including railways. That the assessments from which the old Acts contained exemptions were not public, parochial, or parish burdens within the meaning of those statutes, but at all events that the exemptions did not extend to assessments imposed by statutes passed subsequent to the date of the alleged exempting statutes. The L. O. (Jerviswoode) held that respts. were exempt from these assessments. The First Division adhered. The Commrs. appealed.

The LORD CHANCELLOR (Hatherley) was of opinion that the House must adhere to the conclusion already arrived at in *Duncan v. North-Eastern Ry. Co.* (*ante*, p. 338), for, so far as there were any differences between the two cases, those differences were in favour of appts. There was some slight difference in the wording of the two local Acts, which professed to exempt the lands taken for the railway from public burdens and taxes, but they did not substantially differ from the language of the

exemption used in the local Acts mentioned in *Duncan v. North-Eastern Ry. Co.* In the present case, as in the former, the burden created by the subsequent Acts was an entirely new and different burden from that which lay on the lands at the time the exemption was made.

Lord COLONSAY said, that though he had not agreed with the reasons given in the case of *Duncan*, that case was conclusive.

Lord O'HAGAN said that if the matter had been open for argument, he would have desired time to consider the ingenious and persuasive arguments of respts' counsel, but as this case was really an *a fortiori* case to *Duncan's* case, he entirely concurred.

Reversed.

Act.—Sir R. Palmer, Q.C., Mellish, Q.C.—*Alt.*—Advocatus, Anderson, Q.C.

WILSON AND OTHERS (DIXON'S TRS.) v. WATSON AND OTHERS
(ALLAN'S TRS.)—*July 11.*

(In the Court of Session, Dec. 9, 1868, 7 Macph. 193).

Superior and Vassal—Feu—Conditions as to Building.—In 1855, Dixon's trs. sold a piece of land, part of the lands of Crosshill, to Mr Allan, since deceased, under the conditions that Allan was to erect a villa of a certain value and according to certain plans, and the vendor bound himself to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu-rights and dispositions the like clauses as to erection of buildings and formation of streets and sewers. Allan erected a villa in terms of the conditions, which cost £2000. Dixon's trustees had latterly departed from the original design of selling the lands for villas, and were selling it for flats and houses of an inferior description, thereby depreciating the value of the villa, and an interdict against this proceeding was applied for. The L.O. (Ormidale) granted interdict. The Second Division unanimously adhered, holding that the conditions and restrictions as to the building of villas were binding upon the vendors. The present appeal was brought.

The LORD CHANCELLOR (Hatherley)—One question involved was—What was the proper construction of the contract, and whether the Court below ought to have dismissed the application for interdict, and left the parties to bring an action of declarator, when the whole question could be determined? With regard to the contract, the correct construction was put upon it by the Court below. It amounted to an engagement by the seller of part of the land for a feu to put all subsequent purchasers of land for similar purposes of building under the like restrictions as to the class of house to be built by them. The first question raised had been whether the covenant or contract extended to the whole of the remaining lands of Crosshill, or whether it was confined solely to the plots of land adjacent immediately to the first built upon by Mr Allan. The words were large and general, and, taking all the provisions of the feu-disposition together, there was no reason for confining the application of the covenant to part of the lands. It was said that a difficulty would be found in working out the provisions of the contract; but whether this were so or not, the Court below had reserved to appts. to contend on a future occasion that the contract did not prevent them using their lands in a particular manner, which would not prejudice respts.

Lords COLONSAY and O'HAGAN concurred.

Affirmed, with costs.

Ad.—Advocatus, Sir R. Palmer, Q.C.—*Alt.*—Decanus, Anderson, Q.C.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEENSHIRE.—Sheriffs JAMESON and COMRIE THOMSON.

GEORGE BOOKER & Co. v. ALEXANDER HALL & Co.

Sale—Stoppage in transitu.—The petrs. applied for interdict against the respts. taking delivery of a cargo of wood, which the petrs. sold to them while afloat. The application was based on the ground that the price of the cargo was not paid, and that the respts. were insolvent. Interim interdict was granted, and the action was defended by the trustee on the sequestrated estate of the respts. The following is the S.S.'s interlocutor:—

Aberdeen, 6th May, 1870.—Having resumed consideration of the cause, Finds, as matter of fact, that the respts. bought the timber in question from the petrs., on 17th November, 1869; that it arrived in the port of Aberdeen on 26th November; that, by 7th December, forty pieces or thereby had been unloaded on the quay; that the measuring and unloading of the timber were completed on the 15th December; that, prior to the arrival of the cargo, it had all been disposed of by the respts., with the exception of one-sixth thereof, to other parties; that, prior to the removal of any part thereof, the said one-sixth had been sold by the respts. to Hall, Russell, & Co.; that the respts.' horses and men were employed in the unloading and arranging of the timber for measurement; that, in so doing, the respts. were acting as the agents of the petrs.; that, prior to interim interdict being granted in this petition, fifty logs or thereby of the cargo had been removed by the respts. to a vacant piece of ground rented by them; that the respts. did not intend by so doing to take possession of the said logs for themselves, and that the number so removed by them was held *custodiæ causæ* for the benefit of those to whom it truly belonged; that the price of the timber has not been paid; that at the time when the delivery of the remainder of the timber was stopped, the respts. were insolvent, and knew it: Finds, in point of law, that the taking possession of the portion of the cargo so removed to the respts.' premises was not the acceptance of constructive possession of the whole; that the *transitus* of the timber, which is the subject of this petition, had not been completed, and was duly stopped by the petrs.: Therefore declares the interim interdict granted perpetual, and decerns: Finds respts. liable in expenses.

Note.—The right of stoppage *in transitu* seems to be the offspring of the rule of the law of contract, by which either party may withhold performance on the failure of the other to perform his part. Lord Kenyon speaks of it as "an equitable lien adopted by the law for the purposes of substantial justice." On account of its remedial nature the law regards it with considerable favour. Before effect can be given to such a claim as that now made by the petrs., three facts must be established—I. That the price of the goods stopped has not been paid. II. That when stopped the buyer was unable to pay the price. III. That the transit from seller to buyer had not ceased.

1. There is no question that the price of the cargo in dispute has not been paid.
2. When the timber arrived the respts. had an interest only in one-sixth

of it. It came on the 26th November. But on the 25th the Bank, being shown a statement of the respts.' affairs, had stopped their credit. Subsequent inquiry disclosed that at that time they were even more hopelessly insolvent than was then known. On the day when the measuring of the cargo was commenced, the respts. disposed of their remaining one-sixth of the timber, "because they could not pay for it." When it became necessary to remove the cargo from the quay, the respts. wished to put it on neutral ground—their expectations of being able to arrange with their creditors and carry on their business plainly arising not from any doubt of their insolvency, but from a hope, which was not realised, that their creditors might accept such composition as they were able to offer. In short, there seems no reason to doubt that, on 24th November, before the timber reached Aberdeen, the respts. were insolvent, and were aware of the fact.

3. The main difficulty of the case arises here. Was the transit complete? Applying the principles indicated in the first paragraph of this note, the Sheriff-Substitute is of opinion that it was not. The position when interdict was granted was this. The respondents held the bill of lading as indorsees. They were liable to the sellers in the price of the whole cargo. Their horses and men were employed in unloading it. It was all out of the ship, and on the quay. They put a small part of it upon their own ground, and then refused to have anything more to do with it. The property in the timber had passed to the respondents, but unless they had got possession, the petitioners' right to stop, seeing that the respondents could not pay the price, remained. The vendor does not part with his lien until the goods have actually reached the hands of the vendee, or of one who is his agent. The vendees here expressly say that they did not take possession of the timber. They were forced by the harbour authorities to remove it from the quay. Their proposal was to put it on neutral ground. They did not do so, but put it on their own ground, but they say—and throughout the whole matter their conduct seems straightforward and honourable—"We did not consider that we were taking it for our own benefit." In point of fact, they could not be taking it for their own benefit, because at that time none of it belonged to them. Even this course, however, appeared to the respondents, after a Sunday's reflection, to be doubtful, and when 50 logs had been removed, they refused to have anything to do with the rest of the cargo.

The intention of the vendee is a material fact in determining such a question as this. So it has been settled in more than one case. See *James v. Griffin*, 2 M. & W., 623. In *Wickhead v. Anderson*, 9 M. & W., 529, Baron Parke says—"The question is *quo animo*, the act was done. My notion has always been that the question is whether the consignee has taken possession, not whether the captain has intended to deliver it." That opinion was approved by Chief Justice Erle, and the other Judges of the Common Pleas in *Bolton v. the Lancashire & Yorkshire Railway Company*, 19th January, 1866. Law Reports, 1 C. P., 431.

The employment of the respondents' horses and men in spreading out the timber on the quay, is undoubtedly an important fact in the case. But it is proved that this was done on behalf of the petitioners. They had to pay for it, and by the custom of the trade it cannot be considered as equivalent to an act of ownership.

Finally, there was a part delivery of the timber. What was so delivered is not included in this action. There may, however, be such a part delivery

of goods, as will operate as a constructive delivery of the whole. But that, it is thought, is only where the delivery of part is intended to be a delivery of the whole. Here the evidence is all the other way. The respondents owned none of the timber when they allowed 50 logs to be put on their ground: they intimated to their adviser that they took it there only for convenient custody, and when their doubts of the propriety of their conduct increased, they refused to take the bulk of the timber which remained.

The Sheriff (Jameson), on appeal, adhered to the S.S.'s judgment (Edinburgh, 11th June, 1870), and the substance of the note is as follows:—

(1.) The question not being with an onerous indorsee, but with the buyers and their general creditors, the delivery to the respts. of the bill of lading did not bar stoppage *in transitu*.

(2.) By usage of trade, it fell on the petrs. to pay the expense of the measurement of the timber, and although the respts. employed their men and horses to assist in spreading out the timber on the quay, without which it could not be measured, this was done *on behalf of the petrs.*, and cannot be held to be an act of ownership or of taking possession. The timber, which is the subject of the petition, and which remained on the quay, was never in the *actual or constructive possession of the respts.*, but was still *in transitu*, and the petrs. were entitled to interdict. 1 Bell Com. 213,355; *Collins v. Marquis' Creditors*, 23d Nov., 1804, F.C.; *Stein v. Hutchison*, 16th Nov., 1810, F.C.

Act.—D. R. Morice.—Alt.—J. D. Milne.

SHERIFF COURT OF SELKIRKSHIRE—Sheriffs PATTISON and MILNE.

STEWART v. SANDERSON.—Dec. 27, 1869.

Valuation of Lands (Scotland) Act, s. 12—Parochial Board—Town Clerk.—The question was whether the town-clerk of Galashiels was entitled to payment from the parochial board for furnishing the inspector of poor with a copy of the valuation roll of the burgh, as required by the said clause. The Board having refused to recognise the amount, the town-clerk sued the inspector of poor in the Small Debt Court, but the question raised being an important one, the S. S. ordered it to the ordinary roll. On 5th Nov. the S. S. finds the town-clerk entitled to payment from the parochial board for collecting and certifying the copy of the roll at the rate charged—4s a folio sheet—but disallows the charge made for paper and binding; and accordingly decerns against the defender for £4 8s, with Small Debt Court expenses.

Note.—The question which this case raises is, whether a town-clerk is bound to furnish copies of the valuation roll to parochial boards free of charge? Section 12 of the Valuation of Lands (Scotland) Act, 17 and 18 Vict., cap. 91, provides that the town-clerk "shall furnish" a copy of the valuation roll to every parish, or a copy of so much of it as relates to that parish; but it does not provide that he shall furnish it gratuitously, nor, on the other hand, that he shall be entitled to charge therefor.

The inference drawn by the parochial board is that the duty is one which it falls upon the town-clerk to perform strictly in his official capacity, and, therefore, that it must be held to be covered by his official salary.

The Sheriff-Substitute is of opinion that the duty is a purely statutory one—that it is altogether separate and apart from the usual and recognised

duties of a town-clerk, and for the performance of which, therefore, the town-clerk is entitled to be paid specially.

The question, therefore, arises—By whom does this special payment fall to be made?

The parochial board contend that the magistrates are liable, because they are entrusted with the duty of making up the valuation roll, and are empowered by section 18 to assess for the expenses attending the same. The expense of furnishing gratuitous copies of the roll to parochial boards, they plead, must be held to form part of that expense; and in support of that view they rely upon a decision pronounced in the Sheriff Court of Dumbartonshire—*The Commissioners of Supply v. Barr*, 19th April and 29th May, 1867, reported in the *Poor Law Magazine*, vol. x. (1868), p. 272.

But in holding that the expense of furnishing copies of the valuation roll to parochial boards may be included as part of the expense of completing the valuation, which the magistrates are empowered to assess for, there occurs this difficulty, that the expense of furnishing copies of the roll is incurred subsequent to, and is consequent upon, the completion and authentication of the roll; whereas the statute, as the Sheriff-Substitute reads it, provides that it is only the actual costs and expenses of completing the roll that may be assessed for—that is to say, the costs and expenses incurred prior to the roll being authenticated.

The Sheriff-Substitute is so strongly impressed with the view that expenses incurred subsequent to the authentication of the roll cannot be regarded as expenses “attending upon” the completion of the roll, and therefore that there is no warrant in the statute for assessing for such expenses, that he feels unable to give effect to the above decision.

Upon the whole, the phraseology of section 12 and 18 does not, in the opinion of the Sheriff-Substitute, indicate an intention on the part of the Legislature to interfere with the usual rule of practice, that whoever gets work done for his behoof must pay for it. . . .

In conclusion, the claim of the pursuer against the parochial board seems to derive support from the terms of the Representation of the People (Scotland) Act, 1868, section 18. . . .

The expenses under this clause have been ascertained, and made up; but they do not include remuneration to the town-clerk for providing a copy of the valuation roll to the parochial board. By whom, then, shall the town-clerk be paid, if not by the parochial board?

The defr. having appealed, the Sheriff pronounced the following interlocutor:—

Edinburgh, 27th December, 1869.—The Sheriff having considered the cause, dismisses the appeal, and adheres to the interlocutor appealed from, and decerns.

Note.—The Sheriff agrees generally with the views stated by the Sheriff-Substitute in his note. The Sheriff has looked into all the cases to which he was referred by the appellant's procurator. In all of these cases, it was held—and the Sheriff thinks rightly held—that the clerk of the peace or of the town furnishing to a parish the copy of the assessment roll, so far as relating to the parish, is entitled to payment of that copy. It was not held that he was bound to furnish the copy gratuitously. The only question was by whom he was to be paid, by the parochial board of the parish for whose use it was made, or by the commissioners of supply, or the magistrates in the case of a town-clerk. In the cases where the commissioners of supply

or the magistrates of a burgh were held to be the party liable, it was so held on the ground that it was part of the expense which they were respectively authorized by the Valuation Act to raise by assessment. The Sheriff cannot agree with this. He thinks the expense of this copy—which cannot be furnished till after the assessment has been completed and authenticated—cannot be held as part of “the expense and cost attending the completing of the roll,” for which alone the assessment can be raised, and which assessment under the statute can be applied “for defraying the expenses in making up the valuation rolls,” under the Act, “and for no other uses or purposes whatever.” But even were this doubtful (which the Sheriff thinks it is not) the Sheriff is of opinion that the parochial board is properly liable in this expense; (1) It is for the use and benefit of the parish that the copy is furnished; (2) It supplies the place of the assessment roll, which, previous to the Valuation Act, parochial boards were by the Poor Law Amendment Act bound to make up, and the expense whereof, and of making it up as part of the expenses connected with their management and administration, they had power to raise by assessment. There seems no reason why they should not pay for this copy in like manner as they did for the assessment roll for which it is substituted. On the contrary, there is the plainest reason why the payment should fall on them as properly belonging to the expenses of their management.

SHERIFF COURT OF ABERDEENSHIRE.—Sheriffs JAMESON
and COMBIE THOMSON.

GORDON v. GRANT.—*June 11.*

Act anent winter herding, 1688, cap. 11.—The following is the Interlocutor of the S.S.:—

Aberdeen, 11th May, 1870.—Having resumed consideration of the cause, finds, as matter of fact, that the defr. is a sheep dealer, and that he rented pasture on the Hill of Ardin, on the estate of Delgaty, in the parish of Turriff, in the month of October, 1869; that on the 13th of the said month the defr. was driving a flock of 772 sheep from Asloon to Alford, towards Inverkeithney, in Banffshire, and that in the afternoon of the said day the sheep were rested by him and his shepherd on land by the sides of a drove road falling across Manoch Hill and Sine Hill, on the estate and in the possession of the pursuer, in the parishes of Clatt and Tullynessle; that the sheep remained there during the night, and were driven off early next morning; that the ground on each side of the said road is unenclosed and unplanted; that the sheep trespassed thereon; finds, as matter of law, that the statute of the Scottish Parliament, 1686, cap. 11, does not apply to the circumstances of this case: Therefore sustains the defence, assolizies the defr., and decerns: Finds the defr. entitled to expenses, etc.; reserving to the pursuer all claims of damages or otherwise competent to him at common law, and to the defr. his defence as accords.

Note.—So far as the S.S. is aware, the point raised here is a new one. The defr. was driving a flock of sheep along a drove road which passes across the pursuer's hill. He halted for several hours, and the sheep were not prevented from snatching such a repast as the scanty herbage on either side of the road afforded them. The pursuer is probably entitled to recover damages for any loss that he may be able to show that he has sustained. But in this action he does not sue for damages, or aver loss. He founds on the well-known Act for winter herding passed in 1686, and concludes

for the penalties therein imposed. That statute proceeds on a consideration of the damage sustained by the lieges in their planting and enclosures, through the not herding of bestial in the winter time, "whereby the young trees and hedges are eaten and destroyed." It ordains that "all heritors, life-renters, tenants, cottars, and other possessors of lands or houses, shall cause herd their" sheep, etc., "the whole year, as well in winter as summer, and in the night time shall cause keep the same in houses, folds, or enclosures, so as they may not eat or destroy their neighbours' ground, woods, hedges, or planting; certifying such as shall contravene, they shall be liable to pay half a merk, *toties quoties*, for ilk beast they shall have on their neighbours' ground, by and attour the damage done," etc.

In determining whether the penalties exigible under this statute (which the S.S. believes to be still *in viridi observantia*) are exigible or not, two considerations must be kept in view. It is a penal statute, must not be extended *de casu in casum*, and must be strictly interpreted. Farther, it was passed to meet and mitigate an evil, and to check a practice common at the time, but now unknown. It was then usual for the cattle of every proprietor to be allowed to pasture promiscuously over the whole country, so soon as "haining time" ceased—that is, when the corn was cut.

The S.S. thought it right to allow the parties to lead evidence in regard to the facts of the case, as to which they were not agreed, and now that the exact position and conduct of the defr. have been ascertained, it is thought that, whether or not he is liable in damages at common law, he does not fall within the penalties of the statute. The defr. is a dealer, not a farmer. At the time the trespass occurred he was engaged in driving his sheep from one part of the country to another. He was not—or at least as regards this matter—he was not at the time libelled an "heritor, life-renter, tenant, cottar, or other possessor of lands or houses." The object of the Act was to secure the herding of sheep and other animals *on the subjects possessed* by their owners. It struck at careless herding at home, not careless droving on the road. Of the few cases founded on the Act that have been brought under the notice of the Supreme Court, the S.S. has not been successful in finding any in which the parties were not co-terminous possessors, or, in the language of the statute itself, "neighbours."

Pursuer appealed. On 11th June, 1870, the Sheriff dismissed the appeal, and adhered to the interlocutor appealed from, adding this

Note.—The Act 1686, c. 11, though penal, ranks among those which, being designed for the improvement of the country, and the encouragement of planting and enclosing land, are favourites of the Scottish law, and therefore to be interpreted so as to receive their full effect. (*Vid. Pringle v. Maciver*, 31st January, 1829, 7 Sh. 352, 1 Ersk. Inst. 1, 56 and 57). The proof in this case shows that the ground in question was neither *planted* nor *enclosed*, and that therefore there were no woods or hedges or planting of any kind eaten or destroyed by the defr.'s sheep. The penalties of the Act are therefore not exigible. The bare act of trespass is not what is struck at, but trespass accompanied with eating and destroying of trees and hedges, or even damage done to grass or corns. (*Govan v. Lang*, 18th February, 1794, Morr. 10,499). No damage whatever is proved or alleged in this case, except the act of trespass. The ground on which the sheep rested or trespassed is kept for game only, but there is no mention of game in this statute.

It further appears that it is a public drove road by which the defr. was

driving his sheep, that it has neither ditch nor fence, and that there is heather on both sides of it. The defender states that he has made a practice of going by the drove road for 13 or 14 years, and of always stopping at Sine Hill—part of the hills referred to—and *was never challenged before*.

The Sheriff thinks it very questionable whether the operation of the Act is to be restricted only to parties who are coterminous occupants or owners. There is the highest authority (Luke x. 29, 36) for interpreting the term "neighbour" in a larger sense; and it may reasonably be presumed that the Scottish Legislature used the term in the same sense as it bears in the decalogue. It appears to be so used in an analogous statute—that of 1607, c. 3, anent destroyers of parks, woods, plantings, etc.—"Whosoever shall be found hereafter to break down his *neighbours'* woods and park dykes, fences, etc., shall be convened therefor as a breaker of the law." But it is unnecessary to determine this, as, upon the other grounds indicated, it is thought the trespass here complained of does not come within the penalties of the statute.

Act.—C. B. Davidson.—*Alt.*—N. Clyne.

English Cases.

PAYMENT BY CHEQUE—*Reasonable time for presentment.*—Plt. received, on 11th May, a cheque drawn by deft.'s agent for the amount of a debt owing to him by deft., but did not present it for payment till 9th June, when it was dishonoured, the agent having absconded. On the evidence as to the state of the agent's banking account during the interval, a Judge sitting without a jury found as a fact, that, if the cheque had been presented before 4th June, there was a reasonable chance that it would have been honoured:—*Held*, that on this finding deft. was entitled to treat the giving of the cheque as a payment, his position having been altered for the worse by the unreasonable delay of the holder, and his chance having also been lost of applying to his agent before the latter absconded.—*Hopkins v. Ware*, 38 L.J. Ex. 147.

CHEQUE—*Notice of dishonour.*—The drawer of a cheque, the state of whose account with the drawee is such that he has no reasonable expectation that the cheque will be paid on presentment, is not entitled to notice of dishonour before being sued by the holder of the cheque.—*Carew v. Duckworth*, 38 L.J. Ex. 149.

POWER OF APPOINTMENT—*Fraud on power.*—When an appointment has been set aside on the ground that, though not based on any actual agreement between the appointor and appointee, it was made on a reliance on a sense of moral obligation known to be operating on the mind of the appointee, which would lead her to carry out the appointor's wishes, nothing short of a distinct declaration by the appointor that he considers the appointee relieved from such obligation can make a fresh appointment to the same person valid.—*Topham v. Duke of Portland*, 38 L.J. Ch. 513.

STOCK EXCHANGE—*Liability of jobber who purchases shares—Ultimate purchaser—Calls—Indemnity.*—Plt., through a broker, who was a member of the Stock Exchange, sold shares in a limited company to deft., jobber and member of the Stock Exchange, for the account day. On the day

before the account day, which is called the name-day, deft. delivered to plt.'s broker a ticket with the name of G. as the ultimate purchaser, at a price named, and the names of F. & Co. as G.'s brokers. Plt. made no objection to G. and in due time executed a transfer to him. The real ultimate purchaser of the shares was S., for whom F. & Co. had in reality been acting. The name of G. was passed under an arrangement between him and S., by which, the company having failed, G. agreed for a sum of money to take a transfer of the shares into his own name. He was poor and wholly irresponsible. F. & Co. were ignorant of this and of the arrangement above mentioned, as also was deft. Calls having been made, which plt. was obliged to pay, and G. being unable to indemnify him, plt. sued deft.:—*Held* (per *Kelly, C.B., Bramwell, B. and Pigott, B.*, diss. *Cleaby, B.*), that deft., having acted *bona fide*, and having given in the name of a person as the transferee of the shares, who was willing to take them and had authorized the giving of his name, and whose name had not been objected to within the time limited for that purpose by the rules of the Stock Exchange, had performed his contract and was discharged from all liability to indemnify the plaintiff.—*Maxted v. Payne, (Second action)*, 38 L. J. Ex. 129.

COPYRIGHT—Plagiarism.—Plagiarism does not necessarily amount to an invasion of copyright, and the author of a published book has no monopoly in the theories and speculations, or even in the results of observations therein stated; but no one, whether with or without acknowledgment, is to be permitted to take a material and substantial portion of the published work of another author for the purpose of making or improving a rival publication. Accordingly, a defendant who had systematically, although in different language, appropriated in his book the arguments, rhetoric, results of observations and quotations from authorities from a previous book of the plaintiff on the same subject, was held to have infringed the plaintiff's copyright, although the defendant had employed considerable labour and skill in altering, transposing, and adding to the plaintiff's language.—*Pike v. Nicholas*, 38 L. J. Ch. 529.

BILL OF EXCHANGE—Amount of paid into bank—Suit by drawer against bankers as for money had and received on trust.—A. having accepted a bill of exchange, paid money into his bank upon the express understanding that it was to be applied in taking up the bill at maturity. A. suddenly died before the bill fell due, and the bank retained the money in satisfaction of moneys owing to them upon A.'s general account. The bill was returned dishonoured to the drawers, who thereupon sued the bank in this Court for the amount:—*Held*, that there was no privity to sustain the suit.—*Hill v. Boyds*, 38 L. J. Ch. 538. [Note for Reference:—*Moore v. Bushell*, 27 L. J. Ex. 3.]

LANDS CLAUSES CONSOLIDATION ACT—Valuation by surveyor—Costs of respondents appearing when not interested.—Where there is any doubt as to the true ownership of land taken by a railway company, but neither claimant is absent or prevented from treating, the value of the land should not be determined by a surveyor appointed under ss. 58, 59, of the Lands Clauses Act, but by the verdict of a jury, or by an award under section 23; and when the wrong course has been adopted the compensation money so deposited will not be paid out till the value has been ascertained in the proper manner and paid into Court.—*Ex parte the London and South-Western Rail. Co.*, 38 L. J. Ch. 527.

ANTE-NUPTIAL SETTLEMENT—Fraud upon creditors.—Deft., pending an

action against him for recovery of a debt, married a woman with whom he had cohabited for several years, and in consideration of the marriage, executed a settlement of all his property. The Court, on the suit of the creditor, finding that the wife had knowledge of the facts, declared the settlement fraudulent and void.—*Bulmer v. Hunter*, 38 L.J. Ch. 543.

IMPLIED EASEMENT—Way of Necessity.—If, on the purchase of land, there are circumstances showing a clear intention in the persons interested that there should be a right of way over it, the purchaser having suffered this intention to be acted on, cannot afterwards dispute the right, although it was not reserved in the conveyance to him. Deft. bought the lease of a house, with a road leading through it under an archway. The adjoining land was laid out for building so as entirely to surround a central plot (intended to be used as mews) with houses, leaving the road under the archway the only means of access; but the building was then so little advanced that the plot could still be approached in other ways. The lease contained covenants by the lessee to complete the house according to a specified plan which comprised the adjoining lands and buildings; but deft. declared that he had never seen the plan. No right of way was reserved in the lease or in the assignment to deft., but both contained maps in which the site of the arch was described as a gateway. Deft. did nothing for seven or eight months, and then blocked up the archway:—*Held*, that he could not dispute the right of way, and injunction granted accordingly.—*Davies v. Sear*, 38 L.J. Ch. 545.

CONTRIBUTORY—Purchase in name of an infant—Signature by father of infant's name to transfer.—A father purchased shares in the above company, and had the transfer made to his son, who was then an infant, and at sea. From the father's evidence it appeared that he, another of his sons, also an infant, had signed the transfer in the name of his son. The company had since been ordered to be wound up, and on an application by the liquidator to take the son's name off the list of contributories, and to put thereon in its stead either the name of the father or those of the vendors, the latter were ordered by the *Master of the Rolls*, and on appeal by the *Lords Justices*, to be put on the list.—*In re the National Provincial Marine Insur. Co., Lim.*, (*Mailand's case*), 38 L.J. Ch. 554.

CONTRIBUTORY—Infant transferee—Acquiescence.—A transferee of shares in a company, who at the date of the winding-up order was still an infant, is entitled to treat the transfer to him as a nullity, unless and until he has since attaining twenty-one done acts amounting to complete acquiescence. Such acquiescence held not to have arisen, from the fact that the solicitors consulted by him appeared for him and many other clients at the same time to resist a summons for a call.—*In re the Commercial Bank Corporation of India and the East (Wilson's case)*, 38 L.J. Ch. 526.

CONTRIBUTORY—Questionable liability—Compromise ultra vires—Lapse of time.—D. became a shareholder, in 1846, on the faith of representations which were never made good, and received a dividend. In 1848 he applied to have his shares cancelled, on the ground of these representations; and in 1849 the directors, in consideration of £40, resolved to cancel them. This resolution was never communicated to any meeting of the shareholders, but they were aware that money had been received generally on account of cancelled shares. In 1869 the official liquidator of the company (which was then being wound up) sought to enforce a call against him:—*Held*, that his name was wrongly placed on the list of contributories.—*In re the Agriculturist Cattle Insur. Co. (Dixon's case)*, 38 L.J. Ch. 567.

THE

JOURNAL OF JURISPRUDENCE,

THE DOCTRINE OF ACCESSION.

A CASE which goes somewhat deeper than usual into an interesting chapter of the civil law is reported in the last number of the Court of Session cases—*Wylie & Lochhead v. Mitchell*, February 17, 1870. Messrs Wylie & Lochhead made a contract with a coach-builder named Hutton for the building of a hearse, for which they furnished certain mountings and other materials of the value of £112, while the coach-builder was taken bound to do the work and furnish the remainder of the materials for £95. Hutton having become bankrupt before the hearse was ready for delivery, it was completed by the trustee on his sequestrated estate at a cost of £8 or £10. The trustee, however, then declined to part with it except on payment of the £95, the sum stipulated in the contract. Wylie & Lochhead claimed to set against this sum a debt due to them by Hutton of £75, and their right to do so turned on the question whose property was the undelivered hearse at the date of the sequestration. A petition by Messrs Wylie & Lochhead, for delivery of the hearse on the terms which they offered, having been dismissed by the Sheriff and Sheriff-Substitute, the case was appealed to the First Division, which decided that when two or more persons have each contributed to the production of a new subject their materials or skill and labour, or both, they hold it in common property in the shares corresponding with the value of their respective contributions. Messrs Wylie & Lochhead were therefore entitled to get the hearse, but only on payment of the value of Hutton's contribution—namely, £95.

Stated in this concise manner, the question does not seem to be attended with great difficulty, and the judgment of the Court plainly accords with common sense. The interest of the decision lies in the novel application of the doctrine of accession in the argument for the appellants, and the observations made by the Lord President in refusing to give effect to their contention. The way in which the question appears to have been presented to the Court was this: the appellants having supplied the most valuable part of the materials, these carried with them the less important contributions by Hutton, and therefore,

on the principle of *accessorium sequitur principale*, the entire hearse at the date of the sequestration was their absolute property. The price unpaid being thus a mere personal debt, might be compensated in the manner recognised in the balancing of accounts on bankruptcy.

To this argument the appellants do not seem to have received the proper answer; namely, that the respective shares of the parties in the subject in question having been fixed by contract, the case was one to which the doctrine of accession was wholly inapplicable. As the point is one of some legal interest, and is rather sparingly discussed by our authorities, the subject will perhaps bear a closer examination.

Accession is one of the modes of the acquisition of property—of that form of it, namely, which is called original acquisition, as opposed to derivative acquisition. Since the property of a thing without an owner might be acquired by simple occupation, the transition was easy to this further principle that whatever was added to, or produced by, a thing through natural causes, should be the property of its owner. Hence accession, and hence also, as the next step in the progress, its distribution into industrial or natural, according as its production is, or is not, the act of man; for although it is not in the power of man to create new materials, existing materials may be so altered in form as to be a really new thing, and “*quod factum est antea nullius fuerat*.”

The Roman lawyers applied the principle to three sets of things—the union of an immoveable with an immoveable, of a moveable with an immoveable, and of a moveable with a moveable. An example of the first was the case of an island thrown up by a river, or a portion of the soil torn, by the force of the current, from one side and thrown on to the other. In the second class, the connection might either be organic, as when seeds are sown or trees are planted in another's ground, in which case the property passed to the owner of the soil; or mechanical, as when a new building is erected by one on ground not belonging to him, and in that event the rule is incapable of exception, “*omne quod solo inaedificatur solo cedit*.” If, however, the building ever came to be demolished, the property in the original materials revived, for the ownership during the existence of the structure was regarded as a *dominium dormiens*; and “*caementa resoluta, prior dominus vindicabit*,” l. 23, § 7, D. de rei vin. (6: 1), unless the circumstances under which the erection was made indicated a complete abandonment of his right.

In regard to the union of moveables, accession was divided into three categories—*adjunction*, or the union of two bodies, which being united by only one side of their surface remain distinct and recognisable; *commixture*, the mingling of bodies or fluids into a mass or heap, whereby the component parts become so confused that they are no longer distinct and recognisable; *specification*, the making of one or more things into something entirely new—such as the conversion of a block of marble into a statue, or the making of a web of cloth from another's yarn.

In regard to the first two, these points present themselves for consideration—(1) the intimacy of the union; (2) the relation which the one of the two things united holds to the other—that is to say, which is principal and which is accessory. The first implies such a state of cohesion as to make separation impossible, or, if possible, yet not without such an essential modification of their substance as to be practically impossible. If, for instance, a flock of sheep becomes mixed up with another flock, the property remains unchanged, for the two, though for the time united, may, without detriment, be reduced to their former state: so, if a diamond be set in a ring, the principle of accession is inapplicable, and the separation might be effected by the *actio ad exhibendum*. But where the union is so intimate that the one becomes a mere constituent part of the other, its individuality is destroyed, and, as a consequence, a question as to the right of property arises, which can only be solved in one or other of two ways. Either the proprietors of the two things in a state of separation become joint proprietors of them when united, or both things become the exclusive property of one of the parties, subject to the condition that he shall indemnify the other for the value of what belonged to him. Which of these shall be the legal result depends upon the relation subsisting between the parties. If the union was the result of an agreement between them to that effect they are joint owners, their respective shares being either fixed by the agreement or in proportion to the value of their several contributions. In this state of facts, their relative rights are solved by the ordinary law of contract, and there is no room for the operation of the doctrine of accession. This is abundantly clear from various passages in the Pandects, particularly L. 5, pr. D. de R. V. (6: 1); L. 7, § 8, l. 25, D. de adqu. dom. (41: 1). But where the incorporation is the act of one only of the parties, without the consent of the other, or of some third person, or is the result of accident, then the thing which is accessory becomes part and parcel of the principal, and belongs in property to the owner of the latter.

It thus became frequently necessary to decide what was accessory and what was principal. Sometimes it was considered that that was the principal which was of the greatest value, or which was of most use without the other, or for the ornament or complement of which the other existed. But here it must be admitted that the subtlety of the Roman mind led them into fantastic distinctions. For example, when the union of two metals was made by *ferruminatio*, or welding, accession was held to take place; when by *plumbatura*, or soldering, it was inapplicable.* In a ship the keel was held to be the principal, and the rest of the vessel accessory to it (l. 61, D. eod. t.) The writing

* Item quæcumque aliis juncta sive adjecta accessionis loco cedunt, ea quamdiu coherent, dominus vindicare non potest, sed ad exhibendum agere potest ut separentur et tunc vindicentur; scilicet excepto eo, quod Cassius de ferruminatione scribit. Dicit enim, si statum sue ferruminatione junctum brachium sit, unitate majoris partis consumi, et quod semel alienum factum sit, etiamsi inde abruptum sit, redire ad priorem dominum non posse. Non idem est in eo, quod adplumbatum sit, quia ferruminatio per eandem materiam facit confusionem, plumbatura non idem efficit (l. 23, § 5, D. 6, 1).

followed the paper—"licet aureæ literæ sint;" and if I should write a poem, history, or speech on your parchment—"hujus operis, non ego sed tu dominus esse intelligeris." So Paulus asserts that a painting followed what it was painted on—"quod sine illa esse non potest" (l. 23, § 3, cit.) This opinion, however, was opposed by the Sabinians, and their more reasonable view was adopted by Justinian (§ 34, Inst. de rer. div. 2. 1).

In specification, the question whether the property of the article manufactured belonged to the workman of whose labour it was the fruit, or to the owner of the materials which had been used in its composition, gave rise to a controversy between the Proculeians and Sabinians, which Justinian adjusted by a species of compromise; which, however, in some of the modern codes has been again rejected, and a return made to the Sabinian view.

I. Let us first suppose that the article ~~manufactured~~ was wholly composed of materials belonging to another. The Sabinians distinguished between the substance employed and its form. The former was essential to its existence, the latter secondary and variable. They therefore gave the property to the owner of the materials—"nam quod ex re nostra fit nostrum est."

The Proculeians, on the other hand, held that in law things could only exist for the purpose for which they are serviceable; and without the form given to it the article would be useless. The form, therefore, was of the essence, the matter used merely accessory; and, consequently, the artificer should be entitled to the product of his labour (Gai. ii. 79). This view assumed, however, that the labour employed really effected an essential change in the substance employed—dyeing cloth of a different colour (l. 26, § 3, D. 41: 1), or thrashing grain, not having that effect (l. 7, § 7, D. de acqu. dom. 41: 1).

Justinian adopted an intermediate view, and made this distinction—If the materials employed in the manufacture could be restored to their primitive condition—as in the case of a silver vase—the thing called into existence was not entirely new, but the old material merely existed in a new form, and therefore it reverted to the original owner. But if, through some chemical change or other combination, the manufactured article could not be restored to its original elements, as when one made wine from his neighbour's grapes, or a ship with another's timber, there was here an entirely new species—"ex aliena materia"—and the workman was entitled to retain the product of his industry. Thus, according to the Sabinians, the property, in all cases, went with the ownership of the materials; according to the Proculeians, in all cases to the producer; according to Justinian, sometimes to the one, sometimes to the other, according as the materials employed could or could not be restored to their primitive state. The latter distinction has been rejected by the framers of the French code, which enacts that, in the general case, the property shall go with the materials, subject to the obligation of repaying the workman the value of his labour.*

* Mourlon's Repetitions, vol. i., p. 709.

II. When the artificer used partly his own materials and partly those of another, he was deemed to be the proprietor of the thing produced, if it could not be again restored to its original elements.* It is assumed, of course, that in the manufacture the artificer was really making the article for himself or some other—that is to say, that he was acting *animo sibi habendi*; and the article being for the first time brought into existence, his title rested on the fact that he was the first occupant of a thing hitherto ownerless.† The principle was, therefore, inapplicable to the case, where the workman knew that the materials belonged to another, and acted dishonestly; and in all cases he was bound to compensate their owner for the advantage which he had gained from the use of his property without consideration.

In conclusion, we would only further refer to the very instructive observations of the Lord President in *Wylie & Lochhead's* case. His lordship states with his usual force and clearness the views which were held by Grotius, Puffendorf, and the civilians of that time, on the question before the Court—the result being to lead him to the opinion that the circumstances presented “a new case in our law”—as to which “they had no resource but to call in aid the principles of natural equity.” As we have already seen, the rules of the Roman jurisprudence, and the principles of natural equity, happily coincide in their resolution of the matter in controversy. The basis of the relation between the parties was contract. If *Wylie & Lochhead* had contributed the whole materials for the construction of the hearse, and *Hutton* had only bargained to contribute his labour, undoubtedly there would have been no transference of the property, any more than the cloth given to an insolvent tailor to be made into a coat passes under his sequestration. It does not alter this principle that the materials were to be contributed in certain shares by two persons instead of one, and that the other partner in the transaction was the coach-builder himself, and thus we come back to the principle laid down by all the leading contemporary jurists, that whenever the relation between the parties is the result of contract, the only question is what were the terms of that contract, and it is nothing but a cause of confusion to import into the discussion the rules of accession, which were designed only for the case where the parties were not related to each other, otherwise than through the ownership of the materials in dispute.‡

In the course of the discussion, reference was made to a passage in

* This question has given rise to conflicting views among the modern civilians, but the passage in the *Institutes*, 2, 1, § 25, seems to be decisive.

† See Windscheid's *Pandektenrecht*, § 187, note 4; *Arndt's Pandekten*, § 155, note 1.

‡ A short citation from Puchta makes the point very clear, and exactly harmonizes with the judgment of the Court in the above case:—“Vor allem muss hier der Fall ausgeschieden werden, wenn mehrere Eigenthümer übereinkommen ihre Sachen zu verbinden, z. B. ihr Getreide, ihren Wein, um die Masse gemeinschaftlich zu Markt zu bringen; durch die Ausföhrung dieser Uebereinkunft werden sie Miteigenthümer, jeder verliert sein Eigenthum an seiner Sache und erwirbt das Eigenthum einer Quote des Ganzen, aber diese ist eine Folge ihres Rechtsgeschäfts, und tritt ein, von welcher Art übrigens die Verbindung seyn möge.” Puchta's *Institutionen*, § 242, vol. ii., p. 638.

Professor Bell (1 Com. 178) to the effect that when a person enters a goldsmith's shop and orders a vase to be made, no right is transferred till it is delivered, but when the purchase is of an existing and specific vase which the goldsmith is ordered to finish, the property would pass to the purchaser. Lord Ardmillan observed that the distinction lay in this, that, in the first case, the goldsmith was at liberty to dispose of any vase he was making and to give a good title to another purchaser, provided he ultimately made and delivered to the first purchaser a vase such as was ordered; but, in the second case, the article of purchase was in existence, and could only be given to the first purchaser. This distinction is perfectly just, and may be further illustrated by pointing out that as regards the vase to be finished the goldsmith held a double relation to the purchaser—first, as a dealer in vases; second, as an artificer. In his first character the contract was complete and delivery was made, because *qua* dealer in vases, he had handed it over to himself, as an artificer, for behoof of the purchaser. For that reason, in such a state of facts, the vase, though it had never been out of the shop, would, as Professor Bell observes, not be claimable by the trustee. The illustration, however, had only a remote connection with the question before the Court.

J. G. S.

THE LAW OF NATIONS AND THE LEGAL DOCTRINE OF THE BALANCE OF POWER.

IN the *Journal of Jurisprudence* for December, 1865, (vol. ix, p. 363), we considered some of the objections commonly urged against the science of international law, and endeavoured to show that, notwithstanding the cavils of the school of Bentham, it is truly a system of law, differing from municipal law not so much in its nature as in wanting some of the organs which the latter possesses for determining its rules. We reserved certain questions bearing on the character of international law for discussion at some future time; but as our pages have been required for the discussion of more practical and pressing matters that convenient time has never come. It appears to us, however, that the present position of European politics may lend some interest to a few observations in continuation of our former paper.

While the law of nations is deficient in one at least of the usual organs for determining its rules, it is objected with not less vehemence that it lacks also, what is still more important, the means of enforcing them; that it has no right to the name of law, because it cannot have any sanction; that, while there may be a community of States, there is no common head. It is true that the law of nations does not receive an outward form from the will of a legislator, and that there is no single executive to enforce its rules; but it does not therefore cease to be a law. There was a time when municipal laws were feebly

enforced, and when the powerful in this country did what seemed good in their own eyes; but, though the laws were not, and could not be, enforced by the magistrate, they did not therefore cease to exist. But the law of nations is not altogether without means of making itself obeyed. War, the first and rudest, but still the last arbitrator of States, was not always forbidden to individuals by municipal laws; private contentions used to be decided by judicial combats. And it has been asked, "What are wars but ordeals?"* There are also milder forms of international process, in retortions and reprisals (too often, indeed, but the beginnings of wars), negotiation and arbitration. The use of these four is directed more and more every day by public opinion, which Heffter calls "the organ and regulator," and which we have seen to be, in a sense, the fountain of international law. There remains, moreover, a last appeal to the judgment of history. But there is a power by which the general will of the community of States makes itself felt, and which, though rough and sometimes oppressive, has gone far to supply in Europe the place of a common executive. It is the principle of confederation to prevent the undue aggrandisement or the wrong-doing of any one member of a system of States; the principle to which Demosthenes appealed when he urged the Athenians, having themselves made all possible preparations to check the threatening might of Philip, to send envoys everywhere, to Peloponnesus, Rhodes, Chios, to the Persian king himself,—οὐδὲ γὰρ τῶν ἐκείνῳ συμπεφοβήτων ἀφέστηκε τὸ μὴ τοῦτον εἶσαι πάντα καταστρέψασθαι, (Phil. III., p. 129, ed. Reisk.) As it is necessary for the endurance of a State that the different forces within it should be well balanced, so it is desirable for the peace and welfare of the commonwealth of nations. The principle, accordingly, has been adopted and practised in different ages, and on many occasions; but it is only among the European States that it has been applied with perseverance and regularity.

It is true that even in modern Europe it has as yet been but a teacher of moderation, and not a dispenser of strict justice. The uses to which the theory has been applied, and the consequences that have been deduced from it, have often been detestable and calamitous. But it is yet no chimera, as some have supposed. It is a theory that has always been present, in one shape or another, in the minds of those who have conducted the affairs of States; and it is yet destined, probably in some more perfect form, to exercise an important influence on the affairs of the world. The balance of power has always been a political rather than a legal theory; and even, at the present day, international jurists generally decline to treat it as a part of their science.† We shall see that, as a branch of international law, it derives its practical force chiefly from treaties; although its basis is to be sought in the great principle of self-preservation. The beginning of this system, as it now

* Warnkœnig, *Doctrina Jur. Phil.* c. 10.

† The legal view of it which we present in the present paper, is founded on the able work of M. Ortolan.

exists, is usually placed in the end of the fifteenth century, when Charles VIII. of France had overrun Italy, in order to establish the pretensions of the House of Aragon to the crown of Naples. "The Italians," says Dr Robertson, "quickly perceived that no single power, which they could rouse to action, was an equal match for a monarch who ruled over such extensive territories, and was at the head of such a martial people; but that a confederacy might accomplish what the separate members of it durst not attempt." The sudden and decisive effect of the combination then formed against the French invader, "seems," says the same historian, "to have instructed the princes and statesmen of Italy as much as the irruption of the French had disconcerted and alarmed them. They had now extended to the affairs of Europe the maxims of that political science which had hitherto been applied only to regulate the operations of the petty States in their own country. They had discovered the method of preventing any monarch from rising to such a degree of power as was inconsistent with the general liberty; and had manifested the importance of attending to that great secret in modern policy, the preservation of a proper distribution of power among all the members of the system into which the states of Europe are formed. . . . Nor was the idea confined to them. Self-preservation taught other powers to adopt it. It grew to be fashionable and universal. From this era we can trace the progress of that intercourse between nations, which had linked the powers of Europe so closely together; and can discern the operations of that provident policy, which, during peace, guards against remote and contingent dangers; which, in war, hath prevented rapid and destructive conquests."

At this time the external relations of the European States were assuming a new and more permanent character. Powerful territorial sovereignties had been long established, had consolidated their provinces and extended their boundaries till they touched each other. This tendency had been the effect of family interests and alliances, rather than of any spirit of nationalities. The unity of France was effected under Louis XI.; that of Castile and Aragon by the marriage of Ferdinand and Isabella, and by their conquests from the Moors. The Emperor Maximilian ruled all Germany, and by his marriage with the daughter of Charles the Bold, threatened to add to his dominions the great inheritance of Burgundy. The marriage of their son, Philip the Handsome, with Joanna, the heiress of Castile, produced the vast power of Charles V., and the danger to Europe of a universal monarchy. This alarming preponderance of the House of Austria was the principal feature—the first of the three great periods in the history of the policy of equilibrium, as it presents itself in its simplest form of opposition to one power of alarming growth and pretensions. This period included the wars of Francis I. against Charles V., and was distinguished by the resistance of Austria, which was the leading idea of Henry IV. and Sully, of Richelieu and Mazarin, which, complicated and fomented by religious troubles, culminated in the Thirty Years' War, and finally

produced the Peace of Westphalia, the "basis of the public law of Europe." During this period the balance of power was constantly operative in the councils of princes, though its theory was not yet formed, nor its name invented. But it was as yet entirely a theory of interest, not of jurisprudence. In those days, says M. Ortolan, there was much talk about princes, very little about nations: "*On traite des intérêts des princes, des maximes des princes; on ne dit pas les droits, mais les intérêts: 'Les Princes commandent aux Peuples, et l'Intérêt commande aux Princes,' écrit le duc de Rohan, en tête de son ouvrage.*" Grotius (II. i. 17), writing in the midst of these portentous times, altogether excludes consideration of the alarming growth of a power from the province of law; but allows that it may be a motive to war for him who has otherwise a just cause.

The second epoch in the history of the balance of power is that in which the European States were united against the ambition of Louis XIV. It lasted from about 1667 to 1713, when the Peace of Utrecht was another great realization of the principle of balance. M. Ortolan explains lucidly how the wars in which Louis was, according to his bragging device, "*Seul Contre Toos*," originated in opposition to his schemes to secure the Spanish succession, because they were contrary to the fundamental laws of Spain; and ended in opposition to them, because they were believed to disturb the distribution of power in Europe. A universal monarchy was then the bugbear of politicians; and the phrases, equilibrium and balance, came into common use, though with still less precision and certainty of meaning than now. Puffendorf, the greatest publicist of the time (1672), agrees with Grotius in ranking the fear arising from the aggrandizement of a neighbouring State among unjust causes of war (viii. 6, 5, cf. II. 5, 6), though among those which have some faint colour of legality. Where, however, we have a moral certainty that that power entertains designs against us, so that unless we prevent, we shall immediately feel his stroke, he allows that we are entitled to be the first to attack. But the perception of a common interest among the members of the European State system was not yet strong enough to remove the principle of balance from the province of politics into that of law. This great advance was only to be effected, still in a partial and imperfect manner, by the aid of several œcumenical treaties. Fenelon, forty years later than Puffendorf, gives one of the clearest descriptions of the doctrine that has ever been penned; but he still wrote merely against the universal monarchy, with the fear of which his age was pre-occupied. (The remarkable chapter referred to, is quoted in the appendix to the first volume of Sir Robert Phillimore's *International Law*).

The vague ideas of equilibrium founded on the principle of permanent association among the nations, which had gained some footing by the treaties of Westphalia, Utrecht, and Rastadt, were further realised in practice in the wars against Napoleon, and received legal confirmation and authority from the treaties of 1814 and 1815, and from the Acts of the Congress of Vienna.

It is in these treaties, and the writings of politicians, not in the works of jurists, that we are to seek for that more refined form of equilibrium which depends on the appreciation of a permanent general interest among the States, and which results in a common guarantee of territorial possessions. Since the Peace of Westphalia, European politics have been every year more and more under the influence of the principle of equilibrium, as the bonds of international union have been drawn closer, and power has been shared with the people, whose interest it is to promote peace. Still it was but a policy of interest. We have seen how the fathers of international law rejected it from their science. Their followers in the eighteenth century followed the same course, admitting it only for certain cases and with certain consequences.

At the treaties of Vienna the theory of the balance of power exercised a wider influence, and was placed on a firmer basis, than ever before. That treaty was chiefly intended to restore the equilibrium of Europe.* But it was the natural consequence of the domination which the theory exercised at the time, believed as it was to afford the best security against the recurrence of the evils of the French Revolution, and the wars which sprung from it, that it should be pushed to baneful extremes, and be made the excuse for much injustice. It was imagined that the desired balance would best be attainable in the formation of large kingdoms by the absorption of small States. For this end, a vast and lawless system of repartition was carried out, which brought the Congress of Vienna into bad odour with all free peoples, and greatly diminished the respect entertained for the settlement it effected. Hence it is that the fabric it reared has been so mutilated and disfigured in the course of forty years that, says Count Mamiani, "it has now come to be like that torso of a statue in one of the streets of Rome, good for nothing but to stick pasquinades upon." The true application of the principle would have been found in a league of protection between the greater and lesser powers, and in watching for lawful occasions of union. More real advantage will probably accrue to the balance of Europe from the construction of the Italian kingdom by the will of the people, and without violation of the paramount principle of national independence, than from all the cutting and slicing of the plenipotentiaries at Vienna. "The policy which seeks to establish one principle of international law upon the ruins of another," says Dr Phillimore, (i. 455), "has been, and always must be, a policy as fatal to the lasting peace of the world as the attempt to promote one moral duty at the expense and by the sacrifice of others is, and must be, fatal to the peace of an individual:" "*populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta.*" (Grot. Prol. 18.)

The prominence which the doctrine thus received, compelled all

* "*Les puissances alliées réunies dans l'intention de mettre un terme aux malheurs de l'Europe, et de fonder son repos sur une juste repartition des forces entre les états qui la composent.*"—Convention signed at Paris, 23d April, 1814.

subsequent publicists to give it special attention as a part of international law. But still it has almost universally been regarded as of a positive nature, resting for its obligatory power on the clauses of treaties, and as, in its modern form, beyond the limits of "pure science," except as that has to do with the effects of conventional engagements. At the same time, as M. Ortolan well remarks, we find, on a consideration of all the writings on this subject, "neither consistency, nor even always fixity of doctrine, nor clearness of exposition; that the word balance (*équilibre*) itself is far from having the same meaning for them all; and that, in fine, the result of our reading is much confusion and hesitation."

The balance of power, to speak generally, implies such a distribution of forces, and such an opposition of interests among the nations, that no one State shall be in a position, alone or in alliance with others, to domineer over, or deprive another of its independence. It is evident that the elements which constitute the power of States are uncertain and fluctuating, and that their interests vary from day to day; the equilibrium, therefore, which is the result of such factors, must be inexact and variable; it can never be determined with mathematical precision, and the notion of it will, for the most part, be somewhat indefinite. If there were a tribunal for the settlement of international differences and the determination of the law of nations, endowed with all the powers and attributes of a Court of municipal law, the necessity of an equilibrium of forces would be much less, because, in the event of a conflict of rights, or a claim for reparation of injuries, the appeal would no longer be to arms, but to arguments and justice. Such an institution implies a common executive to enforce its decrees, and the required equilibrium would be obtained by a due distribution of voices in the international synod, rather than of material strength among the States. But such an arrangement is almost utopian. Nations arrange their disputes by battles or by treaties, in which the physical force which may at need be called to support their pretensions has more weight than justice or expediency. It is this fact in the present constitution of the society of States which demonstrates the utility of establishing a certain balance of the forces which may thus be invoked. Among the means employed to produce, to guard, or to restore this balance, some certainly depend on the mere will of each State, and may be adopted or not in each particular case at its own discretion or convenience. But in other cases the action of a State raises questions of law; the measures which the balance of power seems to require may appear to be inconsistent with the rights of another.

In treating of the latter class of cases* M. Ortolan arranges the facts and the legal questions to which they have given rise, under three heads.

I. In the case of a power which waxes great, and threatens to be

* M. Ortolan's work relates to the acquisition of territory, and he treats, therefore, only of questions touching territorial acquisitions which affect the balance of power. But it is apparent that these are the vital, if not the only, questions concerning the subject.

more mighty than all others combined, have the States which fear its preponderance the right, singly or in combination, to oppose by force the extension by which that power becomes so formidable?

II. Where a few great powers serve as mutual checks on one another, surrounded by smaller States, more or less closely united with them by alliances or interest, has each of these great powers, interested as it is to prevent any of them from acquiring a decided preponderance over the rest, the right to insist, with the concurrence or acquiescence of the inferior States, on the preservation of such a proportion as shall hinder that preponderance, and of opposing by force any changes that might destroy the said proportion?

III. Where a conventional arrangement has settled by general treaty and common guarantee a distribution of territory which may prevent such preponderance of one state or another; what is the legal effect of this contract? does such an arrangement give each of the contracting parties a right to resist by arms all subsequent changes in the distribution so made?

It is to be observed, with reference to all three cases, that the legitimate progress of a State in internal resources, by its advancing enlightenment, its increasing industry, population or liberty, gives no right to check that domestic prosperity under any pretext of injured balance, or otherwise. The theory of equilibrium rightly interpreted here, allows emulation in the same course; it admits no legitimate cause of obstruction. Is the case altered, if the threatened preponderance be caused, not by the mere development of internal resources, but by the accession of a country and its people, by the federal union of one State with another? M. Ortolan maintains that if such extension of territory be obtained in a perfectly legitimate way, by the occupation, for example, of unappropriated land, or by regular and voluntary cession, if the rights of each population and the sovereignty of the people have been respected, other nations, however their interests or their jealousy may be affected, have no right of opposition. "Just as the development of the interior resources of a people is an amelioration, a progress for humanity, to prevent any obstacle to which would be a violation of the laws of our nature; so is it with these extensions, these accessions, these legitimate unions, effected by the pacific and sovereign will of nations. Amelioration is not in *le morcellement*, in division, rivalry; it is in mutual approximation (*rapprochement*), in cohesion, in fusion of interests, of sentiments and collective forces. It is for the nations which fear lest these legitimate external advances, accomplished by other powers, should place them in a state of comparative inferiority of strength, to derive from their desire for equilibrium an impulse towards similar external progress, to unions, to federative affiliations, of a kind legitimately to fortify them in their turn. Here again the desire of equilibrium may be a source of emulation, but ought not to degenerate into a right of obstruction."

On the contrary, all States have an unquestionable right to oppose any extension or aggrandizement effected by unjust means, because it

is an infringement of the law of nations. The doctrine of the equilibrium here affords a determining motive for their opposition; but a justifying cause exists, independently of it, in the breach of the law.

Such are the abstract principles which govern, or ought to govern, the application of this theory. But when we come to transfer them to the world of facts, and to make actual use of them there, the question is more complicated and obscure. The multitude and ever new variety of international relations, like those of individual intercourse, always produce difficulties in the application of rules of law, which we are slow to perceive when we treat them as abstract doctrines or scholastic formulæ. And these difficulties are tenfold greater when there is no superior authority, whose decision settles each case. The very independence of nations, the quality which differentiates international law, makes it necessary to take account of States only as they are. "It is one of the peculiarities, and one of the important necessities of the diplomatic science, to tolerate and to accept established governments under reservation of the principles we profess and follow in our own conduct."

The application of these principles is often encumbered, or entirely hindered, by the fact that the positive element of the law of nations is too widely different from that ideal law (so called law of nature), with which it is the aim of the best scientific jurists in theory, as it ought to be, in practical affairs, the endeavour of statesmen and of all who have the power of acting on the conduct of national affairs, to bring it into closer harmony. As a matter of fact, the aggrandisements which have most usually brought this principle or policy of equilibrium into action, have been effected by means sanctioned by the usage of ages and the consent of the nations, though not by the rational law of nations. Successions, testaments, royal marriages, are circumstances belonging to the system of patrimonial kingdoms, which is now vanishing from the earth. They are not yet obsolete, and in times past they have been attended by great results. "It cannot be said that they are just in the eye of the law rational, it cannot be said that they are unjust according to the law positive; but the latter law, in allowing them, imposes a limit,—that which is found in the political equilibrium." It is an imperfect but salutary check to the inherent vices of those modes of acquisition which have hitherto prevailed; and when they shall have disappeared, it will still be a salutary restraint on those vices of human nature which develop themselves as well in nations as individuals, and in republics as well as monarchies. In the same way the balance of power presents an obstacle to excessive acquisitions by conquest also. There is here another conflict between the rational and positive law of nations, which, in this respect, too, can be only approximated to one another, but not as yet entirely reconciled.

"In fine, the principles of the political equilibrium constitute a conventional consuetudinary law (*un droit conventionnel coutumier*), justified by the imperfections of public institutions, and intended to

limit the modes of aggrandizement or development of exterior power which usage limits, although they are not conformable to the abstract verities of the rational law. The positive international law sanctioning the defective modes of aggrandizement or development sanctions also their corrective." It needs only to be added that, according to our present light, the balance of power would seem still to remain necessary when most of these vicious institutes shall have been reformed. The principle can only be dispensed with when a radical reform is effected on human nature itself.

The answers to the three questions are now easily given, barring the specialties attaching to each.

I. The aggrandizement of a single nation in respect of all the others of the same society, if made by just means, cannot be resisted: it can only be counteracted by fair competition. If it is effected by injustice, the right of opposition is competent to all, irrespective of the considerations of equilibrium. If it is the result of modes of acquisition permitted by the positive law, but not agreeable to the ideal law of nations to which the spirit of the world is tending, then the political equilibrium marks the limit beyond which changes so wrought must not pass.

II. The second question assumes the existence of a certain number of great powers exercising rival but varying influence over their lesser neighbours; a group of diverse forces, acting at different times in different directions, varying in intensity, yet capable of producing a mutual balance. This balance is not definite and invariable in respect of the forces by which it is produced. Some of them may be increased or diminished; some may be removed and new ones added; the directions in which they severally act may be altered, and yet such an arrangement may be preserved that a certain equilibrium of the whole is constantly maintained. Unstable and indeterminate as this arrangement is, it undoubtedly gives a right to any member of a group to oppose the encroachments by which another would obtain undue preponderance over the State or States which form its natural counterpoise, whether these encroachments be unjust in themselves, or, though repugnant to the ideal, are yet permitted by the positive law. In the former case, the right exists independently of this theory; in the latter, it is the corrective of a faulty code; and authorises each state to prevent all chances which shall affect the equilibrium; or at least to require that in each new distribution of forces the desired equilibrium shall be preserved.

III. The third question adds to the conditions of the preceding one a formal contract between the states composing a group, in order to establish such a distribution of forces as shall effect an equilibrium; a situation to which the European kingdoms have been tending during the last two centuries. The law of contracts has here to be applied in combination with the principles of the balance of power. Although, in actual diplomacy, the will which receives effect, and the interests represented, are very often those of a prince

or a dynasty, not of the nation, still this mode of regulating international relations is generally, with all its defects, infinitely preferable to the continuance of existing difficulties and grievances, or to the solution of them by violence. But even if actual diplomacy were in all respects conformed to the conditions of the abstract theory of international justice, if all contracts were really expressions of the will of nations, it is to be remembered that the province and power of conventions are limited. Good faith, and the observance of engagements regularly contracted, are primary necessities of human intercourse; but these engagements must deal with objects which lie within the disposing power of the parties, and which are in themselves permissible. The sale of a man's liberty, an obligation to suffer personal mutilation, or to commit a crime, would be void and without effect in private law. Similar restrictions exist in the law of nations.* "That would," says M. Ortolan, "be a curious and important chapter, and one which is still wanting in the principal treatises on international law, in which it should be determined with precision and with the authority of law, what are the matters which it is not permitted to States to dispose of, what are the engagements which it is not lawful for them to undertake?"

From the principle that sovereignty is inalienable, that *a portion* of it cannot be usurped or annihilated by foreign powers, and that when this has in part happened, the right still subsists, and may at any time become patent, the following consequences are deduced:—

No powers in congress assembled can by treaty unite several peoples into one, or into a federation, neither can they separate one into several, without the consent of those interested. Even if such union or division shall have taken place, and the parties interested shall have acquiesced, they are always entitled to revert to their original state, or to resort to any other arrangement that may suit them, always, says M. Ortolan rather loosely, having respect to the equities of the past (*sauf le règlement équitable du passé*). The contracting powers themselves cannot validly bind themselves never to unite themselves into one State or federation, or never to divide into a greater number; and this always for the same reason, that the subject-matter of the contract would be an inalienable attribute as to which no valid international engage-

* "Strange is it, indeed," says Count Mamiani, in his eloquent work on the "Rights of Nations," (p. 24) "that the law of nations should have remained on this point inferior to the civil law, and that whilst the Roman legislation was unintermitting in its generous concern to release the private citizen from bondage, and whilst the northern nations boast of having now eradicated the last relics of the serfdom of the globe, the international system of law still speaks so timidly of the innate and inprescriptible rights of the people! And let us add, that this latter kind of liberty is yet more necessary than the former. More necessary, inasmuch as the individual man, though he be in servitude and chains, may, with an effort, preserve the liberty of his spirit, and may accomplish, in another mode, and under other conditions, a certain heroic purgation and wondrous perfecting of his inner and immortal nature. But for a whole people this is impossible; in servitude it becomes of necessity corrupt and abject; and therefore Gian Vincenzo Gravina has rightly declared the liberty of the nations to be a sacred thing, hallowed by right divine."

ment can be made. The same rules apply to all conventional agreements which involve renunciation of what is part and parcel of the inalienable right of sovereignty. They have been exemplified in recent history in the reversal of many of the arrangements of the Congress of Vienna; in alterations of the federal constitution of Germany inserted in the final Act of that Congress; in the disjunction of Holland and Belgium; in the separation of part of Lombardy from Austria, and in other cases.

Treaties such as we have referred to are commonly concluded at the end of general wars; they determine the actual rights of parties as founded on the past, and form a starting point for the future. "But they cannot govern future events, arrest the progress of new causes, and nail down the future to the *status quo* which they have organised." The guarantee so given of a constitution, a federative system, a certain state of possession, binds the guarantors to defend against attacks from without; it gives no right to confine or violate the sovereignty of any State in the matters which depend essentially on that sovereignty.

The same principles, therefore, are to be applied where there has been a general conventional arrangement of the balance of power as in the two former cases. The parties to such a treaty have no right, for the sake of preserving the political equilibrium, to object to modifications of that territorial arrangement effected by legitimate means, and therefore without violation of the inalienable sovereignty appertaining to each nation. If results injurious to their interests, or to the general balance, are produced by such means, they must seek to obviate them in just and regular ways, by the legitimate combinations which they have at their disposal.

If changes are brought about by unjust means, the right of resistance which already exists derives new energy and stronger motives from the stipulations of the treaty and the guarantee it provides.

Finally, in the case of successions and conquests, creatures of the positive law, the theory of balance, fortified by the guarantees of the treaty, operates as a corrective and limitation of these defective and pernicious institutions.

By such considerations, we are led to the conclusion that the balance of the material forces of the States which form one group is useful for the maintenance of the independence of each and all; nay, it is a necessity, so long as it is by means of these forces, directly or indirectly, that international disputes are determined in the last resort. It is the object of the incessant action of politics to establish or maintain this equilibrium by all the resources and combinations lawfully competent to the activity of nations. But it is too true that the principle, good in its proper place and applied in conformity with the rules of law and justice, becomes an evil when it serves as a pretext and instrument for the gratification of envy or ambition; if it is perverted for the accomplishment of iniquitous partitions, or for the subjection of the weak beneath the yoke of the strong. It is, in short, good or bad according to the intention of those who invoke it and the use which is made of it; it is

indeterminate in the elements of which it is composed, and variable from day to day. For which reasons M. Ortolan refuses to accept it as a principle of the rational law of nations; but only as a limit supplied by the customary law to the imperfect methods of territorial aggrandizement which that law also permits. When M. Ortolan wrote, ten years ago,* there was a movement in Germany for including in the confederation the non-Germanic provinces of Prussia and Austria. The constitution of the Germanic confederation was inserted in the final Act of the Congress of Vienna; which could, indeed, give no right to the subscribing powers to oppose modifications freely made by the parties interested in that constitution. But an external increase of extent of the confederacy by a mere conventional arrangement, having no foundation either in "the pure principles of the rational science," nor in the clauses of treaties, might be rightfully opposed by each power subscribing the general treaties, as being incompatible with the balance of Europe. A different question is slowly but surely tending to a crisis in our days. It arises out of the growth of a united Fatherland in Germany,† proceeding by the gradual formation of a national spirit and the obliteration of the dynastic and political and financial landmarks which have hitherto divided that great country into a multitude of awkward fragments, that mutually abolish each other's legitimate influence. The union of these by the will of the populations into one great State, more especially if effected gradually, is a process which can give no just offence to the other European powers. Treaties are made to secure, not to curtail, national freedom; and it is the highest function of national freedom to fix the character and extent of the State in which only it can be recognized. It has been the peculiar happiness of Italy that its unification cannot be seriously detrimental, in any respect, to the balance of power, while, as regards some interests, it may prove advantageous to it. The same event happening in Germany will certainly affect far more profoundly the whole European system. It may be, perhaps we might say it will certainly be, that France, for instance, will take umbrage at the formation, even by universal suffrage, of all the German speaking peoples from the Baltic to the Adriatic, and from the Hague to the Vistula, into one homogeneous empire. Would France be entitled to interfere by arms? Would the States of Europe have any right to prevent the new birth? We apprehend that on the principles laid down, which have now been accepted by the public opinion of Europe, and confirmed by the precedent of Italy, the effects of German unity, if injurious, must be counteracted by counter-developments and combinations, not by force of arms. They may provoke to emulation in the arts of peace, which give power to nations, and to those alliances and amalgamations which can be effected by lawful means; but they will not justify a warlike interference to readjust the balance of power,

* See *Annuaire des deux Mondes* 1851-52, p. 955.

† This was written five years ago.

unless the statesmen and people of Germany shall first transgress the laws which guard the rights of other nations.*

We cannot take leave of this subject without again insisting on an abuse and defect in the balance of power as regulated since the fall of the first French Empire by congresses. These, while they have certainly done some little to realize the universal Christian Republic planned by Sully and Henry IV., and while they have given to international law some shadow of a supreme legislature and some approximation to an executive, have as certainly abused their power in vindicating one principle of that law at the expense of others as important and as sacred. They have been composed only of the representatives of the great powers, and they have therefore been guilty of the very vice which Frederick Schlegel points out as inherent in the system of balance during last century. "It was easy to foresee," he said, "that the smaller states would more and more be sacrificed to the gratification of the larger ones. Under such a system Europe would become divided, if not in name, yet in fact, between a few large states." If it were so last century, it was but natural that when the great powers became the organ of the European commonwealth, they should, with every profession of the highest morality, and with a considerable desire to act honestly, too often ignore the rights and injure the self-respect of the weak. This in great measure originates the objections we constantly hear to the shortcomings of international law; shortcomings which we have seen to arise necessarily from the absence of those more perfect organs which the very existence of the State affords to every municipal code. The principle of balance of power, even when wielded by a general and recognised congress, is but a makeshift, the application of which is always difficult, and will only be brought to greater perfection with the formation and growth of a more enlightened public opinion, acting in a wider circle, enforcing a more strict observance of the existing law of nations, and procuring gradual ameliorations both of the law itself and of the rude instruments by which it is declared and executed. Public opinion forms and regulates alike the civil law within a State, and the public law which governs its external relations; but hitherto its action upon the latter has been always less efficacious, and sometimes partial and vicious. Here is another peculiarity arising from the nature of the persons subject to the law of nations and the circle within which it bears sway. An eminent Judge remarked, "It is not easy to say what public bodies may do. We see that individuals and public bodies act very differently in regard to matters. Neither nations, nor multitudes, nor public assemblies, nor corporate bodies

* A case somewhat stronger than this may be imagined. Suppose France and Italy were to amalgamate, and did so by vote of the peoples, is it to be presumed that they do so *animo spoliandi*, and are therefore liable to be checked and held apart by the rest of Europe? We think it cannot be so argued on the principles of M. Ortolan. But the ground taken by Dr Twiss, s. 103, and the absence of distinction between modes of extension of the primary and secondary laws, leads to the supposition that he would allow interference.

are always under the same control and restraint that individuals are. They do acts that individuals would shrink from." (Lord President McNeill in *M'Millan v. Free Church of Scotland*, 22 D.)

One explanation of this phenomenon given by Adam Smith is still not inapplicable, though the extension of commerce, the diffusion of education, and the progress of liberal opinions, have very materially increased the number, nearness, and influence of "indifferent and impartial spectators." The passage is as follows:—

"Of the conduct of one independent nation towards another, neutral nations are the only indifferent and impartial spectators. But they are placed at so great a distance that they are almost quite out of sight. When two nations are at variance, the citizen of each pays little regard to the sentiments which foreign nations may entertain concerning his conduct. His whole ambition is to obtain the approbation of his own fellow-citizens; and as they are all animated by the same hostile passions which animate himself, he can never please them so much as by enraging and offending their enemies. The partial spectator is at hand; the impartial one at a great distance. In war and negotiation, therefore, the laws of justice are seldom observed. Truth and fair dealing are almost totally disregarded. Treaties are violated; and the violation, if some advantage is gained by it, sheds scarce any dishonour upon the violator. The ambassador who dupes the minister of a foreign nation is admired and applauded. The just man who disdains either to take or to give any advantage, but who would think it less dishonourable to give than to take one; the man who in all private transactions would be the most beloved and the most esteemed, in those public transactions is regarded as a fool and an idiot, who does not understand his business; and he incurs always the contempt and sometimes the detestation of his fellow-citizens. In war, not only what are called the laws of nations are frequently violated, without bringing (among his own fellow-citizens, whose judgments he only regards) any considerable dishonour upon the violator; but those laws themselves are, the greater part of them, laid down with very little regard to the plainest and most obvious rules of practice."—(*Theory of Moral Sentiments*, part iii., ch. iii.)

We find in the florid page of Gibbon (ch. v.) another cause which has co-operated in producing the crimes of policy. "Falsehood and insincerity," he says, "unsuitable as they seem to the dignity of public transactions, offend us with a less degrading idea of meanness than when they are found in the intercourse of private life. In the latter they discover a want of courage; in the other only a defect of power; and as it is impossible for the most able statesman to subdue millions of followers and enemies by their own personal strength, the world, under the name of policy, seems to have granted them a very liberal indulgence of craft and dissimulation." The world, that hunts down the labourer that shoots a partridge, readily forgives the emperor that filches a province.

When Agesilaus in Plutarch (Vit. Ages. 37) says, "that the Lace-

daemonians neither know nor give heed to any other rule of right than that which they think conducive to the aggrandisement of Sparta," he points out in the love of country a virtue which is always apt to conflict with the duty of obeying the laws of nature and of nations. Cosmopolitism in individuals is certainly not to be greatly admired, for this, among other reasons, that it is hard enough for the most capacious intellect to discern what most conduces to the happiness of a people, much more of the human race. But it is clear that international law will not attain anything like maturity until there be a more prevailing cosmopolitism in the moral feeling and conduct of nations. Truth and justice ought not to be confined to any physical limits; their application should not be bounded by any geographical or ethnical line. From Hobbes to Phillimore the State has been represented by lawyers and philosophers as a moral and a legal person, and not until this conception is transplanted from the closet to the agora,—not until it becomes a living conviction in the soul of the people, and ceases to be merely an abstract idea in the intellect of the jurist, can the law of nations receive its just place and exercise its due influence in the world. There have lately been many hopeful symptoms of the development of *national conscience*, especially in our own country: but even here it is to be feared that, as a nation, we "do acts which individuals would shrink from." The position of a nation, owning no earthly superior, can, indeed, never be exactly parallel to that of the individual subject of a municipal code; but we believe firmly that, amid all the discouragements and difficulties of mundane politics, there is a gradual progress towards a State morality and a State responsibility, of which Machiavelli never dreamed, and for which Bodinus and Grotius hardly dared to hope. "There is reason to expect," wrote Dr Samuel Johnson, "that as the world is more enlightened, policy and morality will at last be reconciled, and that nations will learn not to do what they would not suffer."

RECENT CASES ON COMPENSATION FOR INJURIOUS AFFECTING OF INTERESTS IN LAND.

THE case of *The City of Glasgow Union Railway Co. v. Hunter*, as reported in the Court of Session, January 22, 1868, 7 Macph. 69, appears to be either very imperfectly reported, or to have been imperfectly argued. The judgment *assumes* that compensation is due under the Railways Clauses Consolidation Act for vibration caused by passing trains after the formation of the line, a proposition for which there was then only the authority of three English Judges, forming a majority of the Court of Exchequer Chamber, while on the other

side in the same case were the two Judges of the Court of Queen's Bench, Baron Channell who dissented in the Court of Error, and Lord Chief-Justice Erle whose opinion was not counted in the latter Court, though it was prepared before he left the bench, and is printed in the reports (see 35 L. J. Q. B. 53; 36 L. J. Q. B. 139; L. R., 2 Q. B. 223, 7 B. and S. 1). A decision of that character surely ought not to have been regarded as closing the question in a Scotch Court; and we cannot but think that some error has crept into the report. It is equally impossible to suppose that the counsel for the railway company did not contend that no compensation was exigible under the statutes, and that the Court took no notice in giving judgment of so important a point if it was argued.

That judgment was followed in July, 1869, by the reversal by the House of Lords of the decision of the Court of Exchequer Chamber in *Brand v. Hammersmith Ry. Co.* (38 L. J. Q. B. 265; L. R. 4 App. 171); and as the necessary consequence by the reversal, by the same tribunal (*supra* p. 464), of the judgment of the First Division in *City of Glasgow Union Ry. Co. v. Hunter*. As these decisions introduce, or rather firmly establish, a new principle in the law relating to compensation for lands taken or injuriously affected by the exercise of statutory powers, it is proper to examine them somewhat carefully, and the more so because we regard that new principle as involving a serious injustice, and requiring the interposition of the legislature.

In order to entitle a party to compensation under the provisions of the Lands Clauses and Railways Clauses Consolidation Acts, the injury which he suffers must (1) be such as would be actionable if done by an individual or by the company, if they were not authorised by statute to do the act by which it is caused (*Penny v. S. E. Ry. Co.*, 26 L. J. Q. B. 225; 7 E. and B. 660; *Chamberlain v. West End of London Ry. Co.*, 31 L. J. Q. B. 201; *Caledonian Ry. Co. v. Colt*, June 24, 1859, 21 D. 1108, *revd.* Aug. 3, 1860, 3 Macq. 838).^{*} This is the general and established opinion: but Lord Westbury explains "injuriously affected" to mean merely "damnously affected," and observes "there is nothing in the statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action" (*Rickett v. Metropolitan Ry. Co.*, *infra cit.*, and *cf.* per Lord President in *Hunter's case*). But it does not follow that a party "would have a right of compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action;" per L. Cranworth, C., in *Caledonian Ry. Co. v. Ogilvie*, March 30, 1856, 2 Macq. 229; and perhaps the case of *The City of Glasgow Union Ry. Co. v. Hunter* is one in which this observation is illustrated. (2) The injury must be one done lawfully by the company under their Act. For wrongs done by

^{*} An exception has been held to exist where the injury is done on the claimant's own land taken from him by the company by force of their statute. *Re Stockport, etc., Railway Co.*, 38 L. J. Q. B. 258.

the company not in the exercise of their statutory powers, an action lies at common law (*Caledonian Ry. Co. v. Colt, cit.*; *Broadbent v. Imperial Gas Co.*, 7 H. of L. Ca. 600, 26 L. J. Ch. 276; 29 L. J. Ch. 377. (3) It must be an injury to the land itself, and not an injury personal to the owner or occupier, which he suffers in common with the rest of the public (*Caledonian Ry. Co. v. Ogilvie*, June 12, 1850, 12 D. 999, revd. March 30, 1856, 2 Macq. 229; *Rickett v. Metropolitan Ry. Co.*, 34 L. J. Q. B. 257; 36 L. J. Q. B. 205; L. R., 2 App. 175), where the principle was carried to an extreme length, *renitente* Lord Westbury, namely, to this extent that the interest of the occupier of a tenement fitted up and hired for a particular trade, is not an interest in land such as to entitle him to compensation for loss of trade arising from obstructions caused by a railway company in the course of constructing their works (*Eagle v. Charing Cross Ry. Co.*, 36 L. J. C. P. 297; L. R., 2 C. P. 638; *Beckett v. Midland Ry. Co.*, 37 L. J. C. P. 11; L. R., 3 C. P. 83; *R. v. Metropolitan Board of Works*, 38 L. J. Q. B. 201; L. R. 4 Q. B. 358.

(4) A fourth leading principle is now fixed by the cases of *Brand v. Hammersmith Ry. Co.* and *City of Glasgow Ry. Co. v. Hunter*, which may be thus stated:—The injury for which compensation is payable must be caused by the exercise of the company's powers in constructing, maintaining, or altering the railway, and not by the exercise of the statutory powers in using the railway. This was enunciated very distinctly by Lord Westbury in *Rickett v. Metr. Ry. Co., cit.*, and was indicated in various earlier cases, *e.g.*, *Reg. v. S.-E. Ry. Co.*, 29 L. T. Q. B. 124; *Croft v. L. & N.-W. Ry. Co.*, 32 L. J. 113, 3 B. & S. 436; but has only now been authoritatively settled by the Supreme Court of Appeal as the true meaning of the statutes. It at once strikes us that this rule leaves many kinds of injury to property without remedy, because no action lies for injuries lawfully done by the company in exercising their statutory powers in working the railway; *e.g.*, for fire caused by sparks from engines where every proper precaution has been used (*Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 579), or, as in the cases in question, by the vibration and smoke caused by passing trains. The two peers who formed the majority in *Brand v. Hammersmith Ry. Co.* expressed regret that no remedy should have been provided for injuries, the right of action for which was taken away by statute, and Lord Cairns dissented from the judgment. As it is, however, the judgment of the Court of last resort, the dissent of Lord Cairns, of Willes and Lush, J.J., and Bramwell, B., among the four Judges who attended to assist the House, and of Lord C. J. Erle, Keatinge, and Montague Smith, J.J., among the Judges in the Courts below, can, of course, have no effect to diminish its authority. But the legal commentator cannot avoid noticing that the decision is that of Lords Chelmsford and Colonsay only, supported by the solitary opinion of Blackburn, J., among the consulted Judges, of Mellor and Channell, J.J., among the Judges who heard the case in the Courts below (for Lush, J., changed his opinion after hearing the argument in the

House of Lords), and probably by that of Lord Westbury, as stated in *Ricket's* case. It is thus the opinion of three law peers (throwing in Lord Westbury, who gave no judgment in the case) and three Judges of England, against that of Lord Cairns and six Judges.

This "unsatisfactory termination," as Blackburn, J., describes it, and as all those who concur in it seem to consider it, has been arrived at simply upon a strict construction of the statutes, and is another of many proofs of the fact that, whether for good or evil, the days are gone by when judicial interpretation was strong enough to avert many a gross injustice. The right of an owner of land to compensation for injury sustained by the exercise of the aggressive or compulsory powers of a company is held by the House of Lords to depend on the 6th and 16th sections of the Railways Clauses Act; and these sections are held to be governed by the heading prefixed—"And with respect to the *construction*," etc. The "injurious affecting," for which compensation is provided, is that only which is caused "by the construction thereof," and the damage is only that "sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers, by this or any other Act incorporated therewith, vested in the company." The words, "by the construction thereof," do not, it is held, apply to any injury which is not the immediate consequence of the construction of the railway, because a wider interpretation would extend the compensation clauses, as Lord Chelmsford argues, to every accident or injury occurring upon the railway after its construction. We scarcely think so; because few of these accidents arise through "the exercise, as regards such lands, of the powers" conferred by the statutes.

These words, "as regards such lands," appear to be those which have the strongest effect in limiting the application of the compensation clauses, and excluding claims for injury done by the use of the railway when completed. It is difficult to say that to run trains from the Waverley Bridge to Portobello is an exercise of the powers conferred by statute "*as regards*" a land in Leith Wynd, although the said land may be severely shaken by the passing trains. In the 16th section, the claimant's counsel founded on the words empowering the company to do "all other acts, necessary for making, maintaining, altering or repairing, *and using* the railway;" and requiring the company to "make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers." But this phrase is explained to mean merely that the company may do all acts necessary to enable them to use the railway; and, indeed, it would be rather a forced construction to hold acts necessary *for* using the railway to mean acts necessary *in* using it.

As the judgment is without appeal, and will settle the law until Parliament thinks fit to interfere, it would be practically useless to weigh the arguments of Lord Cairns and the Judges who take the other side. It is now fixed that compensation is due only for damage done by the construction, maintenance, alteration, or repair of the

statutory works,* and not at all for any injury sustained as regards lands injuriously affected by the use of the railway when made. We cannot say that this construction of the Act is wrong; for though the legislature would probably not have desired to exclude compensation for such loss in all cases, the words of the Acts are certainly not clearly intended to cover it. All that can be said is, that they might be interpreted, without straining it, as covering it; and that a number of the Judges have considered it right to prefer justice to critical purism. It is further to be observed, that the injustice of the judgment is confessed by the learned persons who feel themselves compelled to pronounce it; and that it must, therefore, be a pressing duty of Parliament, with all convenient speed, to remove the possibility of that injustice occurring in future.

ANSWER TO QUERY.

HYPOTHEC.

A landlord lets to one tenant from year to year several subjects, separate and distinct as to situation, use, and rent. The stock in one subject is insufficient to pay the rent, but there is a surplus of stock in another after paying the rent due for it. Is the right of hypothec general, entitling the landlord to take the whole rents out of the whole stocks promiscuously, or is it special, and restricted to the stock in each subject for the rent thereof?—J. C.

It seems to be quite clear on principle that the hypothec is confined to the stock in each subject for its rent. Only if the subjects were let under one contract would there be colourable ground for a different opinion (*Gordon v. Suttie*, June 11, 1836, 14 S. 954); but even in that case, the subjects being truly distinct as stated, the same answer must be given. The matter is so clear that there seem to be no cases directly bearing on it. See *Meek v. Smith and Rennie*, June 15, 1832, 10 S. 652.

Reviews.

Jurisprudence; or, the Philosophy of Positive Law. By the late JOHN AUSTIN, Esq. Third Edition, by ROBERT CAMPBELL, Esq., Advocate and Barrister-at-Law. London: John Murray.

To avoid the reviewing of this book has been, from obvious considerations, a matter of difficulty with us; but to review it has proved, after various trials, to be a matter of, if possible, still greater difficulty.

* It does not seem to be doubtful that compensation may be recovered for vibration, smoke, or noise, by which lands are injuriously affected during the progress of the construction of the railway. If that be so, why should the remedy not be extended?

The book contains an exposition of a system of jurisprudence; and the essence of it cannot be given in short compass, the thoughts set forth in it being pretty closely hung together (fragmentary and unfinished though the speculations be), and for the most part revealed to the understanding of patient and intrepid readers in the minimum of words. Loose, popular talk about these speculations is a kind of thing not altogether impracticable, but what is the use of loose, popular talk about the philosophy of law to an audience of lawyers? "Of less than no use it is," we take leave to think, most deliberately and obstinately, and we decline to mislead any professional man or high-aspiring student with cloudy, vague declamations about that or any similar subject. We beg to say that whoever would extract from this book any portion of the large amount of wisdom accumulated in it, through the meditation and industry of an acute, honest, truth-loving man, upon various concrete manifestations of law, more especially upon the laws of ancient Rome and of modern England, must read and re-read and reflect upon the pages out of which he would gather the ideas and try to realise them to his own mind, and that, in order to appropriate completely the results of the book, it is necessary to work the isolated ideas into coherence with each other, or to fill or try to fill up gaps which may have been left by the author's fastidious unsatisfiable turn of mind, and ill health, and impatient unconquerable death. One of the results capable of being inferred from the work as actually done is the almost superhuman difficulty of doing what Mr Austin aspired to do. Here, also, it seems to have been possible to fall so far short of the *ideal* as to show that even in the prosaic field of juristic philosophy, as in other fields of aspiration, there may exist and flutter upward and be baffled "the desire of the moth for the star." We are, of course, not unaware that there are some who say or shriek, almost in a feminine fashion, that Mr Austin was not fitted intellectually for his work; that he was indolent and morbid of temperament; that he wasted his strength upon devising definitions, and that he never got beyond these definitions; that he was not unlike the architect whose efforts and complete performance stop short with staking off the foundations of a building, drawing little bits of the plan, and leave the projected erection as vague and uninhabitable as a castle in the air; and we can see that there is a sort of ostensible justification for such strictures. But we shall believe, without enormous reservation, in these damnatory criticisms and assertions of all but total failure, only when we see clearly that some one else has succeeded better than Mr Austin did. We think he did really a great work under a very heavy weight of fetters, physical, professional, mental, and social. A tougher body, a more energetic, decisive, indifferent turn of mind, a less sensitive conscience, a more appreciative audience than in this age can be found among modern lawyers, utilitarians, and mammon-worshippers, friends of a higher creed, a nobler ideal than Bentham and Mr John Stuart Mill, would separately and collectively have been of all but miraculous service to him.

But we must take a really great man as we find him, and be thankful that the impediments and bonds of this particular great man were not worse, and that they were in some particulars counterbalanced. For one thing, Mr Austin had an admirable wife; and but for her encouragement as wife, and her editorial labours as widow, the world would have been little the wiser of her husband's speculations. To her it is in a great measure that the public are indebted for these volumes. She edited them out of the MSS. of lectures which had been twice delivered in London, and altered and again altered, so as to render her editorial labour very difficult; and she was, at the time of her death, in the course of preparing this third edition for publication. Manifestly she was no common woman. The story told by her—very interesting, but very sad—of her husband's life, its efforts and its failures—which is reprinted in these volumes—shows very clearly what he was and what he did; but it also shows, quite unintentionally, what she was and what she was capable of doing, and that was something at least worthy of Mr Austin's wife and Lady Duff-Gordon's mother (the talented only child of the marriage of this intellectual pair). Thus, then, at least there was one helper and blessing accorded to his outward lot. And to the inward man there was given, in addition to a clear, refining, and super-refining logical intellect, a good conscience, which was ever faithful to right, and which, if sometimes inadequate as a stimulus against weariness in well-doing, was always adequate to prohibit positive wrong-doing, so that whatever he did may be relied on as done in the most perfect integrity and sincerity of heart; and his writings may be read with a confidence which cannot be safely bestowed upon the writings of the majority of even non-legal men and women. Strangely enough, his utilitarian creed does not recognise conscience at all, except as some kind of vague statistical estimating or guessing about pleasure and pain. But the man lived the life and did the work of a really conscientious man in defiance of his creed. No man ever philosophised about utility and attained less of it, according to the ordinarily accepted standard of pounds, shillings, and pence: no man ever was fuller of doubts about conscience in theory, but revealed fewer of that class of doubts in practice.

Having thus conclusively refuted utilitarianism by his life, it would be odd if his book should, by logical processes, demonstrate the opposite. We do not think that it does; but it says pretty nearly the best that can be said in favour of the proposition that utility is the basis of both (Mos and Jus) positive morality and positive law; and, seeing that arguments appealing to utility are almost the only arguments which are accepted as relevant in all existing and recognised processes of law-making, both legislative and judicial, we are compelled to accept of this book as resting law where the large majority of modern talkers and writers have agreed to rest it, and to admit that upon the foundation of utility no system of

speculation less likely to be mischievous, less likely to sink man into a tame beast of prey, or an animal hungering incessantly after all kinds of carnal gratification and other sweetmeats, could be devised, because the author was far better and nobler than his philosophy.

That philosophy it is no immediate business of ours either to refute or expound. But we are afraid Mr Austin's speculations could not be very fairly expounded by a disbeliever in that philosophy; which fear is an additional reason for our letting the substance of this book alone, and for confining our remarks mainly to the outside of it. Those who desire an exposition and full length friendly criticism, will find it done—as only one living man can do it—by Mr John Stuart Mill in the *Edinburgh Review*, for October, 1863, and in the third volume of his discussions. For the rest we must refer to Mr Austin's own pages. These pages have been in this edition enriched by passages from Mr Mill's short-hand notes of the lectures, as delivered in London to him and other students, which passages Mr Austin spoke *ex tempore*, he having great faculty in that way and very little faculty in ever becoming satisfied with anything he wrote, however deliberately it was done. It is further enriched by excellent notes—rather too few in number—from the pen of Mr Robert Campbell, advocate and barrister-at-law, which notes, for one thing, illustrate Mr Austin's philosophy from the doctrines of our law—that law being of more use in illustrating philosophy, except by way of frightful example, than the law of England. Mr Campbell has done his whole editorial work admirably. Not one man in a hundred would have done it so well, and not one in a thousand would, in the doing of it, have kept himself so unobtrusively in the background.

The Law Magazine and Law Review, or Quarterly Journal of Jurisprudence, for August, 1870. Being No. LVIII. of the New Series (and No. 168 of the Law Magazine). London: Butterworths, 7 Fleet Street. Edinburgh: T. & T. Clark, and Bell & Bradfute.

THIS quarterly organ of the legal profession in England maintains its respectable character. The present number contains various papers of more than ordinary interest. A commentary and argument on the injustice that has apparently been done in a recent Irish decision (*Tottenham's Estate*, 3 Ir. Eq. R. 528) by the system of parliamentary conveyances conferring an indefeasible title, leads to an exhaustive consideration of the authorities in English law with regard to personal equities, with the view of showing that their operation on such indefeasible titles might lead to a redress of that injustice. The conflict between the jurists of this country and those of the United States, with regard to the sale of property in *transitu* by a belligerent to a neutral, is the subject of an able article. The writer arrives at a more decided opinion than that which the Attorney-General, under a sense of official responsibility, ventured to express in Parliament, for

he concludes by asserting that "little doubt remains as to the right of a neutral to purchase a foreign ship of a belligerent power, at home or abroad, in a belligerent or neutral port, or even on the high seas, provided the purchase be made *bona fide* and the property passed absolutely and without reserve, and the ship so purchased becomes entitled to bear the flag and receive the protection of the neutral state of the purchaser. It is true that this is a view of the subject which may not have passed beyond the reach of controversy; but certainly, as observed by a learned writer, it is a point which, if judicial conviction, positive law, and international policy have not yet reached, they are irrepressibly tending towards it both in Europe and America." The principles which lie at the root of the constitution of Courts of Prize and the rules of law as to the waste lands or commons of England, form the subject of two articles. Then follows an article called "The Scottish Bench—the Recent Vacancies by Death," consisting of a very short sketch for English readers of the constitution of the Court of Session, and of sketches nearly as slight, but graceful, of the four Judges who have recently been removed by death, Lords Justice-Clerk Patton, Mackenzie, Manor, and Barcaple. The writer remarks, in concluding: "It is well worthy of consideration whether it is wise to delay placing gentlemen on the Bench until age has begun to quench the vigour of manhood; when the new path of life, with its incessant call to labour, accompanied by the intense sense of responsibility, may be expected to produce an early paralysis and collapse of physical and mental force. It is well understood that the salaries of the Supreme Judges in Scotland are on a scale so very low as often to obtain a declinature from advocates in first rate, and therefore really very remunerative practice, to accept promotions to the Bench until they have greatly impaired their abilities by hard work at the Bar, so as to obtain an income with which they might be able to uphold the dignity of the Supreme Bench, which the salaries attached thereto are totally inadequate to sustain. No economy can be more hazardous to the highest interests of the country. Nothing enlists the attachment of the people to Government more than the pure and right administration of law by Judges of the highest eminence that can be obtained; whilst the reverse, even on suspicion, is the fruitful parent of discontent and disaffection." The truth of these observations excuses the barbarous clumsiness of the language in which they are expressed. The lawyer will find some interesting matter in the article on the Right of Counsel to Recover his Fees, and in that on the Administration of Justice in India.

The Month.

The Education of Law Agents.—We are indebted to a valued and well-informed correspondent for the following observations on a communicated paper on this subject which appeared in our last number:—

SIR,—Will you allow me to notice the communication on this subject, which appeared in last number of the *Journal*?

I entirely agree with the writer of that article in his opinion that the training and examination that were required of a procurator before the Act of 1865, were practically altogether worthless. In his approval of the changes introduced by the Act in these particulars I also concur with him, as well as in his views respecting the advantage to the public that results from having men of liberal culture for their legal advisers.

The object of the article in question is not, however, to enunciate such views; but that object begins to be disclosed, though with reserve and caution, in the complaint that "the Act, as administered, is a great grievance" to those who began their apprenticeship before it passed; or, to be explicit, the General Council's administration of the Act is the grievance complained of, on behalf of those individuals.

And, having thus ventured to approach his subject (for it is not even yet quite reached), the writer next proceeds to indicate, with many compliments and apologies, that the grievance arises from the alleged impracticable style of examination adopted by the General Council. The mask may be considered as laid aside altogether at this point; for certainly if the examinations are impracticable in their style, the grievance is not limited in its operation to those who commenced their apprenticeship before the Act was heard of. And the complaint, which, if well founded, might surely have been made with less timidity and circuitousness, turns out to be one on behalf of the rejected candidates generally.

The writer supposes that there is a determination that only first class men are to be admitted. I may be allowed to say that I know a number of gentlemen who have been passed by the Council, including some who have gone through their examinations quite recently, down to the very last diet; and though they may fairly be said to be, as a whole, better men than the same number of men admitted under the old system would probably have been, yet I do feel that but for your correspondent's too flattering suggestion, it would not have occurred to me to rank them quite so high as he has done. He will excuse me, however, from venturing further on such delicate ground.

I am chiefly concerned to set your correspondent right with reference to his allegations respecting the style of examination adopted by the Council. Regarding this, though I am quite unconnected with the Council in any way, I have reliable information from candidates and otherwise, and I have to tell the writer of the article in question, that he is here most thoroughly wrong in point of fact. No such questions, in substance, as those he indicates were ever put, nor according to the system pursued by the examiners, were at all likely to be put by the Council. The instances he gives are complete perversions and distortions of questions put. And it does appear to me that he might have concluded, had he not been so very zealous on behalf of the rejected applicants, that the examiners whom he compliments so liberally, would have been able to see as readily as himself, that to put such questions as those he instances would be absurd.

If your correspondent could get a perusal of some of the rejected papers, he would, by all accounts, receive some entertainment, and might afterwards be satisfied with the propriety of the General Council's decisions in such matters.

There are one or two collateral points upon which your correspondent has also gone into error. He makes a comparison of per centages between the Law Class examination and those of the Council. The figures he quotes may be accurate—I have not inquired. But even if they are, there are obvious elements of difference

which make it impossible to argue from the one kind of examination to the other. I content myself with mentioning one—namely, that an ignorant student reckons only once as a failure at the Law Class; while the General Council have to examine him repeatedly, and he probably counts as a failure with them three or four times over. Eliminate this element of difference alone, and the two results will not be so very widely apart.

In a similar way your correspondent has a hypothesis of want of special experience in the Council Examiners, and he proposes that a Law Professor (why not rather himself?) should be got to assist. But he forgets that there is one of the Council Examiners who is present at every diet, and if he has not already, certainly will very speedily have, more experience in such examinations than any Law Professor in Scotland. And this is, of course, quite apart from the experience acquired by the other examiners.

With reference to the rawness of many law students, I quite agree with your correspondent, and I hope that the system of examination and training of apprentices now in force, with more or less thoroughness, in most counties, will tend to remedy the past state of matters. But your correspondent is right in saying that that preliminary training should not, to be thoroughly efficient, be under local superintendence, but ought to be managed, as in England, by a central authority. I have good reason to believe that in one or two counties already where the apprentices are nominally under superintendence, it is so more as a matter of form than as a reality.

I have just to add that I have ventured to trouble you on the present occasion because it is desirable that gentlemen who are preparing for the examinations in question should not be misled in their preparations by misrepresentations as to their nature; and also because it is not right that the examiners, who must feel it to be a sufficiently painful duty to reject any candidate, should be liable, in addition, to have their labours subjected to unfounded public criticism.

I am, etc.,

JUSTITIA.

Distribution of Business in the Court of Session.—We have received various communications on this subject, of which some may, perhaps, be published on a future occasion, and others contain suggestions not to be lost sight of. A very able member of the Bar, who is no longer in practice, writes thus:—

"You did well to attack the monopoly of business in the P. H. Ever since I can remember, and for long before, the way in which the business has been managed so as to permit it to be monopolised by a few men, has been the curse of the profession. It starves the bulk of us, in order to overwork some half dozen. If the Court of Session were still, as it once was, a single Court of one instance, the working bar could not be smaller, and this smallness is not only unworthy of a Supreme Court, but is a source, as you well point out, of great inconvenience. The remedies, however, are farther to seek than the *Scotsman* correspondent you quote thinks. Each Lord Ordinary, in point of fact, makes a separate Court, and until you establish the rule that no counsel shall attempt to plead in more Courts than one,—unless upon a special retainer,—you don't get to the root of the evil. If the Lords Ordinary were an even number, attached each to one division only, and if the business were distributed equally among them, this would be practicable. If examiners were appointed to take proofs, the L.O.'s might easily be reduced to four, and the bar thus divided into four sections, two attached to each division of the Court. Divide the patronage and the business equally among the four, and every advocate would be on an equal footing, while the public business would hardly ever stop for want of counsel. I think this would be better than letting the favourite counsel continue to play their profitable game of trying to be in six places at once. However, I don't expect that the present favourites would think with me, and the change would have to be of gradual introduction."

Concealment in Marine Insurance.—The reversal, by the Court of Exchequer Chamber, of the judgment of the Queen's Bench in the case of *Harrowar v. Hutchinson*, 22 L. T. N. S. 684, must be regarded as a leading case on this subject. To avoid repetition, we refer for the facts to our own notes of English cases, *supra* p. 183, where the decision of the Court of first instance is given. The insured had a communication from their captain before effecting the insurance, making them acquainted with the character of the port of Laguna de los Padres. The Court of Queen's Bench held that there was no undue concealment, the underwriter being bound to know the nature of the port, which was one to which the vessel might lawfully go under the policy. The judgment of the Court of Appeal appears, however, to amount to this, that although a port is within a policy, yet if it is not in fact known to the underwriters, and a description of it which would affect the premium is in the possession of the insured, the latter is bound to communicate it to the underwriter. Cleasby, B., says:—

"Silence as to certain material particulars is one thing, but hiding and covering them up is another; and in such a contract as this, which is always said to be *uberrimæ fidei*, avoids the policy."

And this seems to be the principle of the decision. Martin, B., did not think Laguna de los Padres a port within the meaning of the policy, but referring to all the facts, he said:—

"I am of opinion that there was a wilful concealment in this case, all this being known and not communicated to the underwriter. Having communicated in another quarter not the whole of this, but only a part of it, they were told that the premium would be five guineas. Afterwards to keep all this back from another underwriter and insure with him at the rate of 40s, is, to say the least of it, a concealment. In my judgment it is something more: it is a fraud." And Mr Justice Willes to the same effect:—"This is a case not of mere concealment of the port from which the vessel was intended to sail, but of procuring a policy by the concealment of circumstances beyond and besides, though including that fact, and which, if disclosed, would have enhanced the premium."

It may be useful to some of our readers to have before them Lord Chief Baron Kelly's review of the authorities in the case. His Lordship said:—

"The real question in the case is, what are the facts which an underwriter ought to know? In *Carter v. Boehm*, Lord Mansfield thus states the proposition: 'The assured need not mention what the underwriter ought to know, what he takes on himself the knowledge of, or what he waives being informed of.' He then gives several instances of facts which the underwriter ought to know. And then he continues, 'The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect.' He ends by saying, 'What has often been said of the Statute of Frauds may with more propriety be applied to every rule of law drawn from principles of natural equity to prevent fraud, that it should never be so termed, construed or used as to protect or be a means of fraud.' In *Phillips on Insurance*, s. 53, the material fact which may not be concealed is thus described: 'And which is known, or presumed to be so, to the party disclosing it, and is not known, or presumed to be so, to the other.' In sect. 571, speaking of the knowledge of trade which is to be assumed, he says, 'The assured is not

required to communicate to the underwriter facts which are presumed or proved to be known to those *conversant with the trade*,' etc. In sect. 563 he says, 'The underwriter is presumed to know the *usages* of the particular trade insured, and these accordingly need not be represented to the underwriter.' Now *usages of trade* can only exist in a known and established trade, and all the analogies seem to show that the usages of trade mentioned in sect. 563 are confined to those of a known and established trade. Thus, in sect. 583, 'If the voyage proposed for insurance is in contravention of a *recent foreign trade law* known to the assured, and not known or *presumed from its publicity or otherwise to be so to the underwriter*, such intended contravention must be disclosed.' In Arnould on Insurance, in the chapter on concealment, it is said, 'Concealment is the suppression of a material fact within the knowledge of either party which the other has not the means of knowing, or is not *presumed to know*.' Afterwards, as an instance, he says, 'a knowledge of the political state of the world, etc., and of the *risks and embarrassments affecting the course of trade*, must necessarily be imputed to the underwriter, and therefore need not be disclosed; but it has been held in the United States, and apparently on very good grounds, that the *new or shifting regulations* of foreign states, by which the property is exposed to seizure, if known to the assured, ought to be disclosed by him; *for they cannot be presumed to have been necessarily within the knowledge of the underwriter*.' Again he says, 'The assured need not disclose what he ought to know, or what he takes upon himself the knowledge of. It is upon this principle that *facts comprised in the general usage of trade* need not be communicated. But in order to dispense with communication of anything done according to usage, such *usage must be general and universally known to all engaged in the trade*.' And again, 'Every underwriter is presumed to be as well acquainted as the assured himself, with all the *general and established restrictions*, or commercial freedom which different states impose, etc.: these are, in fact, *matters of general mercantile notoriety*, which the assured is not bound to communicate, but if the prohibition be of *recent date*, or *only occasional in its nature*, the assured, supposing him to have private means of information, ought to communicate the fact to the underwriter.'"

SCOTCH APPEALS, 1870.—The following is a list of the Scotch appeal cases heard by the House of Lords during the present session, showing the number of days that the hearing of each case occupied, from which Division of the Court the appeal was brought, and the result of the judgment of the House:—

TITLE OF CAUSE.	No. of Days Argued.	From which Division.	Result.
M'Callum v. Stewart,	2	Second.	Affirmed.
Duncan v. Scottish N.-E. Railway Co.,	4	Second.	Reversed.
Campbell v. Leith Police Commissioners,	3	Second.	Reversed.
Tennent v. Tennent,	6	First.	Affirmed.
Leslie v. M'Leod,	4	First.	Affirmed.
Ferguson v. Hay Newton,	4	First.	Affirmed.
Hay v. Hay Newton (same case),	—	First.	Affirmed.
Campbell v. M'Lean,	3	First.	Affirmed.
Waterhouse v. Jameson,	2	First.	Reversed.
Lord C. Hamilton v. Duke of Hamilton,	2	First.	Affirmed.
Caledonian Railway Co. v. Sir W. Carmichael,	2	First.	Reversed.
Shepherd & Co. v. Bartholomew & Co.,	2	First.	Affirmed.
M'Naughton v. M'Dougall,	2	Second.	Affirmed.
Miller v. Learmonth,	3	Second.	Affirmed.
Watt v. Thomson,	3	Second.	Affirmed.
Ligertwood v. Watt,	1	Second.	Affirmed.
Forbes v. Rev. R. Smith,	3	First.	—
Skene v. Smith (same case),	—	First.	—
Paton v. Smith,	3	First.	—

TITLE OF CAUSE.	No. of Days Argued.	From which Division.	Result.
Keith v. Reid,	1	Second.	Reversed.
Fraser v. Crawford,	2	First.	Affirmed.
City of Glasgow Railway Co. v. Hunter,	3	First.	Reversed.
Gray v. Turnbull,	2	First.	Affirmed.
Earl of Zetland v. Glover Incorporation of Perth,	3	First.	Affirmed.
Lord Advocate v. Trustees of Donaldson's Hospital, ...	2	First.	Affirmed.
Lanarkshire Commissioners of Supply v. North British Railway Company,	1	First.	Reversed.
Wilson v. Watson,	2	Second.	Affirmed.
Earl of Strathmore v. Dundas,	4	First.	Varied.
Dundas v. Dundas (same case),	—	—	—
Haldane v. Dundas (same case),	—	—	—
Lord Glamis v. Dundas (same case),	—	—	—
Forbes v. Smith, &c., } Skene v. Smith, &c., } Paton v. Smith, &c., }	(Old Machar Locality),	First.	Reversed.

Truck Commission.—Mr C. S. C. BOWEN, Barrister-at-Law, and Mr A. C. SELLAR, Advocate (Secretary to the Lord Advocate), have been appointed Commissioners to inquire into the alleged prevalence of the Truck System, and into the alleged systematic disregard of the Act which prohibits in certain trades the payment of wages in goods. Mr R. S. Wright, Barrister, Fellow of Oriel College, Oxford, is Secretary.

Erratum.—In last number an error has crept into the last sentence of the "Notes in the Inner House." It ought to have been, "the widow and children will be entitled only to the interest actually received, if it be less than legal interest," etc.

Obituary.—FRANCIS JAMES COCHRAN, Esq., Advocate, Aberdeen (1831), of Balfour, Aberdeenshire, died at Aberdeen, 8th July, in the sixty-first year of his age. He was the only child of the late Alexander Cochran, Esq., shipowner, of Aberdeen, by Elizabeth, daughter of George Roger, Esq., of Burnside, Aberdeen. He was educated at the Grammar School of Aberdeen, and graduated at Marischal College, Aberdeen, in 1827. He was appointed agent for the Insurance Company of Scotland in 1835, and clerk to the Shipmasters' Society of Aberdeen, and agent for the Standard Life Assurance Company at Aberdeen in 1836. He was also law agent for the parochial board of Old Machar, collector of county rates for Aberdeenshire, besides holding other appointments. The deceased for many years represented the presbytery of Kincardine-O'Neil, in the General Assembly of the Church of Scotland. Mr Cochran married in 1839, Elizabeth, eldest daughter of Alexander Smith, Esq., Advocate, of Glenmillan, Aberdeen, by whom he has left six children.

DANIEL MACLEAN, Esq., Procurator, Greenock, Procurator-Fiscal in the Burgh Court of Greenock, and in the Justice of Peace Court for the Lower Ward of Renfrewshire, died suddenly at Lamlash, July 30.

WILLIAM KING HUNTER, Esq. of Wellfield, Procurator, Dunse, Agent for Royal Bank of Scotland there, and Clerk to the Commissioners of Supply of Berwickshire, died at Melrose, July 24.

Notes of Cases.

COURT OF SESSION.

FIRST DIVISION.

GOLD *v.* HOULDSWORTH.—*July 16.*

Landlord and Tenant—Lease—Penalty.—Susp. and Int. The question arose upon the construction of a lease for 999 years from 1815, granted by the proprietor of Coltness, the party now in right of which is John Gold. By the lease the tenant, his heirs, and assignees, were prohibited "from keeping a public-house, or selling liquor of any kind at any time during the lease, without a special licence or authority in writing from year to year from" the proprietors "for that purpose, otherwise to pay £10 sterling of additional rent for each time they shall be found guilty of keeping such house, or selling any kind of liquor, and that at the first term of Whitsunday or Martinmas which may occur thereafter, with interest thereof after such term, and a fifth part further of additional penalty in case of failure." The tenant maintained that he was entitled to keep a public-house on paying the additional rent stipulated. The proprietor contended that the tenant was absolutely prohibited from keeping a public-house or selling liquor of any kind without special licence from the landlord, and that the £10 was a penalty, payment of which did not entitle the tenant to contravene the condition of the lease. The L.O. (Ormidale) sustained the contention of the landlord. The Court adhered.

Act.—*Millar, Burnet.* *Agent*—*M. Macgregor, S.S.C.*—*Alt.*—*Sol. Gen. Clark, Moncreiff.* *Agents*—*Murray, Beith, & Murray, W.S.*

CATTONS *v.* MACKENZIE.—*July 19.*

Entail—Trust.—Declarator at the instance of Mrs Catton and husband against the immediate younger brother and heir-at-law and of tailzie and provision of the late Hugh Mackenzie of Dundonnell, to have it declared that the entail of Dundonnell is defective as a strict entail, and that they are carried by a general conveyance of heritage in a trust-deed by Hugh Mackenzie, under which Mrs Catton is the beneficiary or residuary legatee. The L.O. (Mackenzie) pronounced an interlocutor, in which he repelled the pleas in law for pursuers, assoilzied defr. from the whole conclusions of the summons, and found pursuers liable in expenses.

Pursuers reclaimed. It was argued for the defender both that the L.O. was right in repelling the objections to the entail, and that Mr Mackenzie had not intended in his general conveyance to include the entailed estates.

The Court unanimously adhered; but, as their Lordships were agreed that the testator did not intend to convey the estate of Dundonnell by his general disposition, they did not think it necessary to consider the objections to the validity of the entail.

Act.—*Decanus, Watson, J. M. Duncan.* *Agents.*—*Murray, Beith, & Murray, W.S.*—*Alt.*—*Sol. Gen. Clark, Shand.* *Agents.*—*W. F. Skene & Peacock, W.S.*

SECOND DIVISION.

POTTER AND OTHERS v. MRS HAMILTON AND OTHERS.—July 19.

Road—Declarator—Caution for expenses—Actio popularis—Res judicata.
—Petition in the Sheriff Court of Hamilton by John Potter and two others against Mr and Mrs Hamilton, Fairholm House, craving that respts. should be ordained to remove certain gates near Orchard and Langholm Park; and interdict against the respt. obstructing the free passage along an alleged statue-labour road and bridge. Petrs. were all working men, and respts. maintained that they were not the real *domini litis*, and ought to be ordained to find caution for expenses.

After proof the S.S. (Veitch) found that the only remaining pursuers of the action, John Potter and William Potter, had sworn that their wages average 4s 2d and 4s 6d per day, and that they had no other means of any kind, and found, therefore, that defrs. had established their averment admitted to probation—viz., that the pursuers were not in circumstances to pay defrs.' costs if found liable herein, and therefore ordered pursuers to find caution for expenses within ten days. The Sheriff (Glassford Bell) allowed another pursuer to be sisted, and found that the wages of the three pursuers averaged 4s 3d a day, and that funds for carrying on the action were being raised by subscription, towards which one of pursuers had contributed 1s and the two others nothing, and adhered to the judgment of the S.S.

The Court (Lord J. C. diss.) recalled this interlocutor. The majority held that the case differed from the recent case of Jenkins, as in the present case pursuers had the control of the action. The three pursuers were quite entitled to vindicate the rights of the public; and the fact that they were working men gave them a still greater interest in the question, as it was their own class who would probably benefit most by the road being opened. It had been pleaded that a committee of seventeen working men, which had been formed to maintain the public rights, should be sisted; but if the present pursuers were not worth anything because they were working men, it would be no use to sist seventeen others in the same condition. If every one interested required to be sisted in an *actio popularis*, the whole population would require to be made parties. In the case of Jenkins, the pursuers were chosen on account of their poverty, which was not the present case. The case of Jenkins had gone very far, and the Court declined to extend the necessity for finding caution. The tendency of modern legislation was to restrict the cases where caution was required to be found. They also indicated an opinion that, if the case was properly conducted by the present pursuers, it would form a *res judicata* with all other members of the public.

The LORD JUSTICE-CLERK held that the committee should be made to sist themselves. He held that the import of the proof was that the action had been instituted, and was now carried on, by the committee. The committee were now suing through others whose names they used. The fact that other people subscribed towards the expenses of the action, and showed their interest in it, was of no importance. The question was, who had the control of the action?

The Court recalled the interlocutors and remitted back to the Sheriff.

Ad.—Scott. Agents—Crawford & Guthrie, S.S.C.—Alt.—Shand. Agents—Maconochie & Hare, W.S.

HOUSE OF LORDS.

MINISTERS OF OLD MACHAR *v.* HERITORS.—*July 29.*

(In the Court of Session, February 28, 1868, 6 Macph. 504).

Teinds—Valuation in absence of Minister.—In 1862 the minister obtained an augmentation of stipend. The report in the locality on the state of teinds, *inter alia*, bore that the valued teind was exhausted by the old stipends paid to the minister, and that there was no free teind in the parish out of which the proposed augmentation could be provided. The ministers, the respta., gave in objections to this report, and averred that the decrees of valuation relied upon by appts., who were heritors, were not effectual, on the ground—1st. That neither the minister of Old Machar, nor any person representing the cure of the parish, was cited as a party; 2d. That the decree was not a decree of valuation by the Teind Commissioners, but a ratification of an extra-judicial arrangement as to the teinds of the appellant's lands to which the minister was no party. The L. O. (Barcuple) held that the decree of valuation was ineffectual. The First Division affirmed his judgment, Lord Curriehill diss. The heritors appealed.

The cases were argued in May, when the judgment was postponed.

The LORD CHANCELLOR (Hatherley)—These were appeals as to a matter which had of late been frequently discussed, namely, whether valuations of teinds made a century or two ago, in the absence of the stipendiary minister, can now be deemed valid and effectual. The cases of the three heritors, who were appealing in the present case, had this feature in common that it may be taken that the stipendiary minister was not called as a party when the decree of valuation was made. Did that fact vitiate the decrees? In order to appreciate the point, it was necessary to remember that the Commissioners of Teinds were appointed to value the teinds in Scotland in the time of Charles II., and to call the parties interested before them. The parties interested in that valuation were chiefly two, namely, those who had to pay, and those who had to receive the teinds. The latter class were the titulars, who had to pay over part of the proceeds to the stipendiary minister. The titular had unquestionably the first right, and the stipendiary was not directly interested, except in one or two exceptional cases, where he was substantially himself a titular, or the teinds were just sufficient to pay the augmentations of stipend and no more. In other cases, he had no direct interest in the matter. Now there was power given to Sub-Commissioners to make the valuations, and to call all parties before them; and it had been settled by a decision of this House that the absence of the stipendiary minister before the Sub-Commissioners did not vitiate their valuation. There was also an ordinance or standing rule made by the Commissioners to the effect that a valuation might proceed without the minister; and though the Lord President had argued that such ordinance was not an authentic document, Lord Curriehill thought it was; and moreover, that it had been often acted upon, and it had found its way as a genuine one to the Advocates' Library in Edinburgh. If that was to be taken as an authentic document, it was almost conclusive of this question. It was true the Court of Session, who now acted as Commissioners of Teinds, had latterly adopted a stricter rule—namely, the rule followed in their ordinary practice of citing all parties who had any interest, and it

was natural this should be generally regarded as essential. But viewed as part of the practice of the Commissioners of Teinds it was not essential. The titulars had the great and direct interest, and if they were duly represented, that was enough. This was all the more to be taken to be so in such a case as this after the lapse of two hundred years. It was only since 1830 that such strictness in construing these decreets of valuation had been resorted to, and there had not been uniformity of decision. He therefore agreed with Lord Curriehill, that the decreets of valuation in the present cases ought to have been treated as valid and conclusive.

Lord COLONSAY—There was no strong authority in the Scotch Courts on this subject before 1837 which would support respts.' contention. From 1837 to 1851 the point had been much disputed among the Judges, and the late Lord J.-C. Hope had always strongly contended that, in principle, there was no difference between the valuation of the Commissioners and that of the Sub-Commissioners. If that was so, then this interlocutor must be reversed, for the House had already decided that such an objection as the absence of the stipendiary minister was not tenable against a valuation of the Sub-Commissioners. It was true that latterly the Court of Session, as Commissioners of Teinds, had followed the usual practice of their Court in other matters, by calling the minister and all parties interested; but there was no uniformity of practice to that effect before. The stipendiary had only a remote interest at most, being nothing more than a creditor of the titular, and therefore it was not necessary that he should be called as a party, and his absence ought not to vitiate and nullify valuations, especially after the lapse of two centuries.

Lord CAIRNS—The object of this proceeding was to set aside valuations made two hundred years ago, which had been partly acted upon. There had been no suggestion of collusion. The interest of the stipendiary was very remote, and indeed was identical with that of the titular. When the legislature directed the valuation of all the teinds of Scotland, it could scarcely have been intended that every minister should be called away from his holy work to embark in what was in fact a species of litigation in order to protect some distant rights of augmentation which his successors might have. It was not to be taken that he was a necessary party any more than others who had also remote interests to be protected. Therefore, in all the three cases the Court of Session was wrong, and ought to have given effect to the valuations.

Reversed, with costs.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTHSHIRE.—Sheriff BARCLAY.

A. & B. v. C.

Master and Servants—Servants' Food, etc.—These cases are brought under the "Master and Servant Act, 1867." But, as that statute is merely supplementary to previous Acts regulating the contract of service, the question falls to be judged either by the 20 Geo. II., c. 19, sec. 1; 27 Geo. II., c. 6; 31 Geo. II., c. 11, sec. 3; or Geo. IV., c. 34,

sec. 4. These are the only statutes under which the present complaints can fall, and that under the claim of "*wages*." No objection was stated to the jurisdiction or form of action, and with some hesitation the Sheriff has reached the conclusion that the "*Master and Servant Act*," with the statutes above referred to, does apply, although the complaint is not precisely laid as *for wages*. The facts are, that the two complainers, with other three, engaged as servants in agriculture on the defender's farm for a year, from Martinmas last, for £20 each, with the usual allowance of meal and milk—the quantity being at a certain well-known scale, generally known and observed in such contracts. These *five* servants were lodged together in the bothy. Other five servants, including the griever and foreman, were married, and had separate houses for themselves on the farm, with the like supply of food. The food supplies were thus a part of the *wages* earned, to be paid in return for services.

On the entry of the servants, they were each furnished with one firlok of meal, intended to last for two weeks; they next had the supply of half a boll, intended for four weeks; the third supply was one boll, calculated for eight weeks; or fourteen weeks in all. No complaint was made of the quality of these different supplies. But on a fourth supply of a boll for other eight weeks being served out, the five bothy men unitedly complained of its bad quality, and refused to receive it. All five, on 19th April, presented complaints under the "*Master and Servant Act*," founded on the same ground of action. Three have fallen from their complaints and continue in their service, and are understood to take and use the same meal; but two still maintain their actions, and have left the respondent's service. At the trial, the complainers produced a small quantity of the meal served out to them. The respondent produced a much larger quantity, taken from the same girdel; and it was conceded that both were fair samples of the meal, and all the witnesses proved them to be identical in quality. A portion was mixed in Court with cold water in a tumbler, and shewed unmistakable presence of numerous dark particles.

In support of the complaint, the two persistent complainers swore decidedly to the meal being such as that they could not partake of, and one of them, at least, swore it caused vomiting to him. They stated they had complained to the respondent's griever, but not to their master.

Three extensive meal-dealers in Perth swore that the meal shown them was unfit for human food and unwholesome, and such as none of them would sell and no person would purchase from them.

Two rustics to whom the meal had been previously shown in the district, both at once condemned the meal as unfit for food. One of the servants who had relented from his complaint, swore that though he had authorized and signed the complaint in his name, yet that he never had any serious objection to the meal, but was induced to join in the complaint at the instigation of one or other of the persistent complainers. The pursuers called the respondent as a witness, who swore that he heard no complaint from the servants except through his griever. That the oats from which the meal was made was the growth of his own farm, and sent by him to the mill—that there were everywhere an excess of mustard plants in oats last season, and that tares also grew with the oats, but which he had directed to be carefully separated at the mill, and which was done as well as is usually the case—that on learning the complaint he had caused some porridge to be made from the meal, and though it contained some dark

spots, yet it was to him quite palatable and wholesome. He added that it was his interest to separate the tare seeds from the oats, as the former brought a higher price than the latter. In defence, the grieve and foreman gave evidence that they and their families used the same meal without objection; one of the repentant complainers gave similar evidence, and the tenant of the mill, though admitting that the meal did contain some ingredients of tare and mustard seeds, upheld the meal as good and wholesome, and such as usually was manufactured and sent from his mill.

The operative miller unfortunately was not called, nor the female servants in the respondent's establishment who prepared and likely would partake of the porridge, and who, from their experience in such matters, could give important evidence on the subject.

There is no doubt but that there is here a very great conflict of evidence. As a *general* rule, in which the respondent and every other respectable farmer will coincide, the servants on a farm should receive good wholesome and substantial meal. With them it is the sole "staff of life," and a good day's work cannot be expected without a corresponding good day's nutriment. It will be recollected that oatmeal alone is their dietary—three times in the day—and generally made in the form of brose or stir-about, without any great pretensions to scientific cookery. No doubt there must be no very nice or fastidious taste indulged in as to superior flavour. The Sheriff, therefore, was inclined to view the evidence of the three meal sellers as given according to the quality of meal which they dealt out amongst the more refined citizens of Perth, than for the keener appetites and stronger stomachs of the rural population. But they, nevertheless, had long and extensive experience in the trade in all its grades, and in the strongest terms they condemned the meal as unfit for human food. The complainers having taken the early supplies of meal without objection showed they had no concerted intention to make a challenge until they had good cause for such. At the same time, though the standard of quality may have been changed, yet if it still was substantially good meal they could not fairly complain, because they had been previously accommodated with better flavours.

The evidence of the married servants is of very considerable weight. But there are several considerations which obviously arise in weighing their testimony. Their matrimonial associations, and consequent domestic felicity, very naturally render them more content and acquiescent. It will also be admitted on all hands that this class fare, and are entitled to fare, more generously than their less fortunate brethren. It is not generally that they have three diets of the same species of food, as tea and other simple luxuries occasionally find place in their humble dwelling. Indeed, one meal diet in the day may suffice them, and it has come under the notice of the Sheriff that occasionally they have a surplus of meal for sale. The meal with them is also generally boiled by their helpmates. But this is very difficult in the rough kitchen of the bothy.

The evidence of the repentant complainers is also open to the objection that they did all at one time unite in the same complaint, and much is due to the proper influence at all times exercised by a master over his servants, and their natural desire not to imperil their place and risk their wages.

Had the Sheriff been called on to decide when the proof was closed he must have held that the preponderance of evidence was greatly with the complainers. It was not necessary on his view to prove that the meal was

actually deleterious or injurious to health. It appeared to him sufficient that it was not a fair average article, such as should be served out to strong young men from whom heavy and constant work is reasonably expected. But as the two samples of meal were put in evidence, the Sheriff deemed it not irregular to have a more minute examination of their quality. Having a life-long experience of the national pabulum, he got some of the contested meal made into brose. The product was simply abominable, and he can scarcely imagine any human stomach, however adamant, that would not revolt at so unsavoury a dish. He then had some boiled. The product was somewhat black, but on the whole there was a great improvement. The bitter taste, however, and which certainly was not of mustard, was still paramount, and though the porridge might be gulped over, with a strain, certainly it could be with no small degree of patient endurance. Still further, to test the stuff, he gave a quantity to an old foreman of some forty years' experience. He was told nothing of the dispute, but simply to test the meal in brose and porridge. His verdict was precisely similar to, if not stronger than that of, the Sheriff. In brose the stuff was unendurable; the porridge was somewhat better. He stated that it was obvious that the meal had been destroyed by getting mingled with an excess of tares. He said it had been often his province to serve out meal to farm servants, but he never served out meal of such a quality; and sure he was, none of his men would have received such a quality of meal from him or any master. Finally, the Sheriff submitted the remainder of the meal to four of the medical staff of the Perth infirmary. They were of opinion that the meal could not be said to be actually deleterious, but that it was highly distasteful and not well fitted for human food, and that a person continually dieting on such meal would in course of time, to all probability, suffer in health—the length of time of course would depend on the strength of the stomach, for which unfortunately there is no uniformity.

From the respondent's high character, the Sheriff is satisfied that he is the last person who would act unfairly with his servants, and that he was ignorant of the true state of the meal supplied, else he never would have permitted it to be given out. The Sheriff is inclined to the opinion, especially in the absence of the operative miller, that due care was not taken to separate the bitter tares from the sweet grain.

On the whole, the Sheriff is of opinion that it is for the interest and comfort of both master and servant that the connection be dissolved, under the powers of the statute, and that the two servants should have their wages, so far as earned. Seeing that the winter months are of less value to the master than those of the summer season, they have thus an advantage, and are sure to have opportunity of summer work, seeing that from their appearance they have not as yet suffered either in nerve or muscle by reason of their unsavoury diet.

Act.—Mitchell.—Alt.—Kyd.

SHERIFF COURT OF FORFARSHIRE.—Sheriffs HERRIOT and ROBERTSON.

CARGILL AND OTHERS v. COMMISSIONERS OF POLICE OF ARBROATH.

General Police Act—"Rubbish and filth"—*Mussel shells*.—The interlocutors in this petition are as follows:—

Forfar, 10th March, 1870.—The Sheriff-Substitute having heard parties' procurators, and having made avizandum with the closed record, together with the joint minute, No. 19 of process, Finds that it is admitted that the "General Police and Improvement (Scotland) Act" of 1862 has been adopted by the Commissioners of Police for the burgh of Arbroath: Finds that it is admitted that the petitioners and other fishermen, residing in Arbroath, have been in the practice of collecting the mussel shells, after the mussels have been extracted therefrom, and depositing the same in ashpits, or other small depots, within the burgh: Finds, in point of law, that under a sound construction of the 132d section of the above Act, these mussel shells, coming under the meaning of the words "rubbish and filth," are vested in the Commissioners of Police, who are entitled to sell the same or dispose of them as they think proper: Finds, therefore, that the present petition for interdict against the Commissioners of Police was unnecessary and uncalled for: Refuses the prayer of the petition, assoilzies the respondents, and Finds the petitioners liable in expenses: Allows an account of these to be lodged by the respondents, and remits this account thereafter to the auditor of Court for taxation and report, and decerns.

Note.—If it were possible to clean out a mussel shell perfectly, when the mussel is extracted, there could be no offensive odour, and no nuisance from a heap of such shells; but it is a well-known fact that a portion of the fleshy part of the mussel adheres to the shell after the rapid action of the mussel-knife, however dexterously applied by fishermen and women accustomed to the craft. A number of these mussel shells and portions of mussels, when collected in a heap, must fester and rot, and in hot weather particularly, must be very offensive to the smell and injurious to health. The fact that these shells are useful for manure in no way prevents the 132d section of the Police Act from applying. The only exception in this section is the dung from stables and byres.

The words, "rubbish and filth," would seem to include all disagreeable matter thrown out into ashpits as refuse; and they are sufficiently wide in their meaning to include the particular nuisance referred to in the present petition, it being impossible in an Act of Parliament to anticipate, or to put a name on, all the component parts of an ashpit, or to designate specifically all the possible nuisances found lying in the streets of a town. For these reasons the Sheriff-Substitute thinks the petitioners must submit to the wholesome regulations of the Act founded on by the respondents.

The petitioners appealed. The Sheriff pronounced the following interlocutor:—

April 16, 1870.—The Sheriff having considered the appeal for the petitioners against the interlocutor of 10th March last, along with the relative reclaiming petition and answers, and having also considered the record, the joint minute, No. 19 of process, and the whole process, recalls the interlocutor appealed against: Finds that the "General Police and Improvement (Scotland) Act, 1862," has been adopted and is in operation in the burgh of Arbroath: Finds that the petitioners, who are fishermen resident in the said burgh, purchase and import mussels into said burgh, for the purpose of their trade: Finds that the petitioners, within the said burgh, having, on or about the 10th day of May, 1869, opened a number of mussel shells, they separated the mussels from the shells: Finds that they used the said mussels for the purpose of baiting their lines: Finds

that they put the shells, from which the mussels had been extracted, into baskets or barrels, and had them conveyed to a place or stance on the farm of Seton, beyond the bounds of the said burgh: Finds that the Commissioners of Police of said burgh seized the said shells, and had them removed to the depot of the said Commissioners of Police: Finds, in point of law, that the said Commissioners were not justified in so doing: Finds that the said shells were, and continued to be, the exclusive property of the petitioners, and were not vested in, and did not become the property of the said Commissioners in virtue of the 132d section of the said Act: Finds that the petitioners state that they intend in future to collect their mussel shells in baskets or barrels, and have them conveyed daily to the said depot or stance on the farm of Seton: Therefore, interdicts, prohibits, and discharges the respondents, as representing the said Commissioners of Police, and all others acting under the authority, directions, or instructions of the said Commissioners, from seizing, conveying away, or appropriating such mussel shells, the property of the petitioners, as have been collected by them in baskets or barrels and conveyed to the said depot or stance on the farm of Seton, or elsewhere beyond the bounds of the said burgh: Finds the petitioners entitled to expenses, allows an account thereof to be given in, and remits the same, when lodged, to the auditor of Court to tax and report, and decerns.

Note.—The question for decision in this case, as stated in the joint minute, is, "whether the mussel shells of the petitioners, after the mussel is extracted therefrom, are, and continue to be, their exclusive property; or whether said shells, after the mussel is extracted therefrom, are vested in, and become the property of, the Commissioners of Police of the burgh of Arbroath, in virtue of the 132d clause of 'the General Police and Improvement (Scotland) Act, 1862.'"

The Sheriff is of opinion that the first of these queries must be answered in the affirmative; and that the second of them must be answered in the negative.

It is clear, beyond all doubt, and is admitted, that the shells were *originally* the property of the petitioners, until the mussel was extracted therefrom. But the respondent claims them as vesting in the Commissioners of Police as soon as the mussel is extracted, in virtue of the 132d clause of the Police Act. To deprive a man of his undoubted property such an Act must be very clear and distinct in its terms. The clause is in the following terms:—"The dust, dung, ashes, rubbish, and filth (excepting always stable and byre dung), within the burgh shall be, and the same are hereby, vested in the Commissioners, who shall have power to sell and dispose of the same as they think proper, and the money arising therefrom shall be applied to the police purposes of this Act; and the Commissioners shall cause all the streets, public or private, together with the foot-pavements, from time to time, to be properly swept and cleansed, and all the dust, dung, ashes, rubbish, and filth to be collected from such streets, privies, sewers, cesspools, houses or premises, and to be removed at such convenient hours and times as they shall consider proper."

In judging of this matter it is important to keep in view the purposes of the Act, as stated in the rubric. It is in these terms:—"An Act to make more effectual provision for regulating the police of towns and populous places in Scotland, and for lighting, cleansing, paving, draining, supplying water to, and improving the same, and also for promoting the public

health thereof." Then the clause in question occurs in Part IV., section 2, of said Act, which has reference to "*cleansing streets.*" The purpose, therefore, seems to be not for transferring the property of one set of men to another needlessly, but of vesting in the Commissioners *only what is necessary for the purposes of "cleansing" and "promoting public health."*

Keeping this in view, the question is—Are mussel shells embraced by the words used in the clause?

They are neither "dust" nor "ashes," neither are they "dung," which is the excrement of living creatures. No doubt they may be used as manure; but this surely is not enough to vest them in the Commissioners. Many things in the burgh may be used as manure, which do not vest in the Commissioners. Salt, soda, lime, bone dust, guano, etc., do not vest in the Commissioners, although they may be used as manure. Bone dust is also "decaying animal matter, and used solely as dung or manure," but that does not seem to the Sheriff to be sufficient to vest it in the Commissioners. Guano really is "dung," besides being "decaying animal matter, and used solely as dung or manure," but it is not vested in the Commissioners. Any of these things might possibly vest in the Commissioners, if necessary for cleansing or sanitary purposes, but they do not necessarily do so.

The next question is—Are mussel shells "rubbish and filth?" This is certainly a more difficult question. Anything liable to decay may, unless duly cared for, very soon be fitly classed as "rubbish and filth." But it seems to the Sheriff that mussel shells do not, on being separated from the mussel, necessarily and immediately become "rubbish and filth," although, no doubt, they may very quickly become so.

A dealer in mussels might open a yard or place of business within the burgh, to which he might bring mussels purchased by him wholesale, for the purpose of selling them by retail within the burgh; he might sell them whole and unopened, or he might open them and separate the fish or mussel from the shells. He might sell the fish or mussels to one set of people—he might surely sell the shells to another. Could the Commissioners enter his yard and seize his shells, they being perfectly fresh? Why enter his yard and not enter those of tanners, manufacturers of artificial manures, etc.? The Sheriff is of opinion that such a person could carry on his business safely, and without let or hindrance, so long as he kept his shells within his yard, and did not suffer them to become offensive and injurious to health.

If such a dealer could carry on his trade, and sell his shells without their vesting in the Commissioners, why may the petitioners not do so? A butcher, after using or disposing of his fleshy matter, sells the refuse—bones or hard matter left over. Why may not the petitioners sell the shells or hard matter left over in their trade?

The strength of the respondents' case against the petitioners is, that they conduct their business, or at least a part of it, not in an enclosed yard, but at the doors of their houses and at the edges of the public streets and foot-pavements. But the Sheriff assumes that they do not either throw the shells on the street or foot-pavements, or keep them so long that they become offensive and injurious to health. If, on opening the shells, the petitioners, or those acting for them, put the mussels on the hooks and the shells into baskets standing beside them, and then have the contents of such baskets carried beyond the bounds of the burgh daily, the Sheriff is of

opinion that both mussels and shells continue to be the exclusive property of the petitioners.

It is said that the petitioners throw their shells down on the public streets; if so, the respondents have a remedy. Any one who throws or lays down any "shells" on any street (which, by the interpretation clause, includes any place used either by carts or foot passengers, etc.) is liable to a penalty, under the 251st clause of the Act. Besides, if so thrown or laid down, it may be necessary, for cleansing purposes, that they should be removed. No doubt, "shells," in this 251st clause, are classed with "stones, coals, slate, lime, bricks, timber, iron, or other materials." These are all valuable things, which, although laid down, continue the private property of those who throw or lay them down. They do not vest in the Commissioners even by being laid down. Persons who lay them down are liable in a penalty of 40s or fourteen days' imprisonment. If a scavenger, in the course of his cleansing operations, were to find any shells laid down on the street, and which he was proceeding to remove, and any one were to claim the shells as his property, such party, by claiming them, would be substantiating the case against himself, and could immediately be prosecuted for his illegal conduct. Besides, shells left amid dust and mud are so liable to become "rubbish and filth," that a scavenger would be justified, in almost any circumstances, in sweeping them off along with the dust and mud or gutters of the street.

It may be said again, that, if the petitioners collect their shells, such shells will become offensive and injurious to health. It seems to the Sheriff that, were the petitioners to keep the shells in their baskets, or any where within the burgh, until they became offensive and injurious to health, the respondents have a remedy again under the 356th and 357th clauses of the said Act.

SHERIFF COURT OF PERTHSHIRE.—Sheriffs TAIT and BARCLAY.

COMMERCIAL BANK OF SCOTLAND v. PINKERTON, CAMPBELL, &c.—*Mar. 25.*

Property—Identity—Retention.—A bank agent was in use to conduct sales of farm produce. He kept the proceeds of these sales in separate bags in the bank office. On his death, one such bag was found, with two others, and its contents were claimed in a multiplepinding, 1st, by the bank, who were large creditors of the agent; 2d, by the executors of the bank agent as his private property; and 3d, by a farmer, whose name appeared on a slip of paper found in the bag. The last was preferred by the following interlocutor:—

Perth, 25th March, 1870.—Having heard parties' procurators, and made avizandum with the process and proofs, Finds, as matters of fact, 1st, Archibald Ballantyne was for several years the agent at Comrie for the claimants, the Commercial Bank of Scotland. 2d, Ballantyne was, at the same time, in the practice of conducting sales of farm produce, and collecting the proceeds thereof, and this he did in the bank premises; but he was in the habit of keeping the money collected severally from the said sales separately from the bank money, and, in particular, he kept bags for each individual sale or employer, which bags were occasionally tied. 3d, On the 7th of August, 1868, Ballantyne conducted a sale at Locherlour for the claimant Donald Campbell, the way-going tenant thereof, and the proceeds thereof uplifted by Ballantyne are of greater amount than the sum in the

bag after-mentioned forming the fund *in medio*. 4th, On the 18th of November, 1868, the inspector of the said bank having visited the bank premises at Comrie, on that day, or the day following, he counted over the cash in the proper repositories of the bank, and at the same time there were, and for some time previous there had been, three open bags on the bank counter containing money, and some of them in addition having accounts connected with sales; but the bank inspector did not count the contents of the said bags as part of the money belonging to the bank, and Ballantyne the agent stated to him that they were not so. 5th, The result of the reckoning by the inspector and otherwise, showed that Ballantyne the agent was due to the bank a sum or deficiency in his accounts greater than the *cumulo* contents in the said three bags. 6th, One of the said three bags (No. 9 of process) contained the sum of £105 8s 10d, and the piece of paper (No. 16 of process) whereon, in the handwriting of Ballantyne, is inscribed the name of "*Donald Campbell*," and it is proved that Ballantyne in the year 1868 had no other sale of any other person of the like name, and no person of that or any other name claims the said fund as the proceeds of a sale or otherwise as being his individual property, and there is no entry in any of the bank books or private books of Ballantyne with reference to the said money, either as the property of the bank, or of Ballantyne, or of the claimant Campbell, or any other person. 7th, The said Archibald Ballantyne committed suicide on the said 19th November, 1868, and the said bags were thereafter placed under judicial authority, and the contents of the bag No. 10 form now the fund *in medio* and the subject of competition.

Applying the law to these special findings of fact, Finds, 1st, The said bag being, according to the practice of Ballantyne, kept distinct and separate from the proper repositories of the funds of the bank, its contents did not form part of the funds of the bank. 2d, The contents of the said bag being kept distinct and separate from the proper funds of Ballantyne, and identified to be the proceeds of the sale of the property of the claimant Donald Campbell, is his property. 3d, The bank, in a question with Donald Campbell, has no lien over his property in security, or towards liquidation of their claim, against the estate of Ballantyne, their deceased agent. Therefore Finds the real raisers liable only in once and single payment of the fund *in medio*, under deduction of their expenses in bringing the action into Court, as the same shall be taxed: Repels their claims, and also the claim of James Colquhoun Pinkerton as executor of the deceased, and prefers Donald Campbell to the fund *in medio*; reserving his further claim on the estate of Ballantyne, but under the very peculiar circumstances of the case Finds no expenses due between the parties claimants, and decerns.

Note.—The Sheriff-Substitute has had no difficulty with the claim of the bank. It is beyond all doubt the money in competition did not form part of their proper funds. Had it been held as the property of Ballantyne, found within their premises, there would have been room for the plea of lien or retention to meet their claim against their agent. But no such plea can be set up against Campbell, who is not their debtor, and nowise responsible for their late agent.

The Sheriff-Substitute has felt more difficulty with the claim of Campbell as against the representatives of the agent. The money was found in the possession of Ballantyne separate from the funds of the bank. Had there

been but one bag then it would have appeared as if the intention of the agent was only to keep his private business separate from the bank, and there would have existed no materials for the division of the contents amongst the claimants unless, perhaps, should the *cumulo* amount in every respect agreed with the *cumulo* collections, and this in the present instance would not have been the result. In that case, very likely, the contents of the bags would have formed part of the estate of the deceased, leaving his employers in the matter of sales to claim and rank with the bank and other creditors on the executry. But, looking at the whole circumstances, there is here such a distinct ear-marking with the bag in question as to fix its identity in favour of the claimant. Had there been a separate box, drawer, or packet inscribed with the name "Donald Campbell," or "Locherlour Sale," there could have been no more doubt than had Ballantyne brought to his premises some of Campbell's stock and crop left unsold. The practice in his very primitive mode of keeping his sale accounts is proved, and every separate bag of the trio is corroborative of its neighbour. No doubt the contents of No. 10 is *minus* the proper sum which stood at the credit of the claimant, and another bag is *plus* its amount. But, nevertheless, each bag stands as a separate voucher so far proclaiming its owner. The claimants' plea would have been weaker had the contents been *plus* his claim, because then there must have been an admixture of other monies, either of those of the agent himself or of some other of his employers. There is something, but not much, in the identity of the notes. But it does not matter that the agent substituted other bank paper, if it were a mere *substitution* and not a radical change of the proper object of deposit and appropriation.

On appeal, the Sheriff (Tait) affirmed, and found Campbell entitled to expenses from the bank, subject to modification. The Sheriff explained his views in the following Note:—

Note.—The case against the bank appears in the whole circumstances to be so clear that Campbell is entitled to any expense caused to him by the bank's contention. The question with Pinkerton is more doubtful, seeing that Ballantyne had the bag in his custody and complete control over it (and considering the state of Ballantyne's affairs), the whole circumstances required to be elicited before the natural right of the executors could be excluded. There was no necessity for a reclaiming petition by Campbell, seeing that an oral pleading had been demanded, so that the expense of such petition should be excluded.

Agents—M'Leish, Pinkerton, Graham.

SHERIFF SMALL DEBT COURT OF KINCARDINESHIRE.— Sheriff WILSON.

STEEL v. BAIN.—June 29, 1870.

Public Burden, 23 and 29 Vict., c. 62.—This action, *inter alia*, raised the question, whether a landlord drawing rent for premises exclusively appropriated to public religious worship was liable to pay poor rates. After hearing parties, the following judgment was given:—

Sheriff WILSON—The Poor Law Act, 8 and 9 Vict., c. 83 (as amended by 24 and 25 Vict., c. 37) provides (in section 34) that the assessment for the poor shall be imposed one half upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish,

rateably according to the annual value; and (in section 40) that in each year or half-year the Parochial Board "shall make up or cause to be made up, a book containing a roll of the persons liable in payment of such assessment." Thus the assessment is one upon persons, and the particular classes of persons on whom it is to be levied are to be defined. Then, the Act 28 and 29 Vict., c. 62, says that "no person shall be rated or be liable to be rated for, or to pay any poor rates for, or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship." This makes the matter clear, for the defender could not be rated as the owner of premises exclusively appropriated to public religious worship, without directly contravening the enactment which says that "no person" shall be so rated. It was said that this reading of the Act contradicted its intention. That argument could be of use only if what was said were dubious, but I think it is not well founded in any view. The object of the legislature was to give certain facilities to persons desirous of using premises for public religious worship, and it effectually helps those persons to give an inducement to owners to let premises to them rather than others. Besides, the Act 28 and 29 Vict., c. 62, is (as it bears to be) copied from an Act applicable to England, where proprietary chapels are common, and where it must have been at once foreseen that the language used would exempt owners. A closer inspection of the English Statute (3 and 4 Wm. IV., c. 30) confirms the notion that the legislature had in view the possibility of rent being derived from premises exclusively appropriated to worship, because there is a provision in it saying what is to be done in the event of rent being got for premises partially occupied for religious worship; and these the statute expressly says are not to be exempted. The matter appearing to me to be quite clear on the face of the statutes, it is not necessary to refer to the case of *M'Isaac v. M'Kenzie*, March 3, 1869, 7 M. 598, but the tenor of that case is also in favour of the defender.

English Cases.

CONTRIBUTORY—Paid-up shares.—A subscriber to the memorandum of association of a company under the Companies' Act, 1862, for shares not expressed on the memorandum to be fully paid-up, but agreed to be issued to such subscriber as fully paid-up shares in part payment of property transferred by him to the company, will be placed on the list of contributories for such shares, but will not be called on to pay more than the balance (if any) which shall be found due from him on setting off, against the calls, what on an inquiry shall be found to be the value of the property transferred by him.—*In re the Heyford Co. (Lim.) (Pell's case)* 38 L.J. Ch. 564.

COMPANY—Winding-up—Shareholder—Agent—Set-off.—C. went to Australia as the agent of a company under an agreement by which he was to act as their agent for five years, at a fixed yearly salary, and was also to receive a commission on remittances. He was required to take fifty shares in the company, and to pay up a portion of their value; and it was agreed that the balance which might become due on account of calls should be placed to his debit in his accounts. After he had carried on business as

such agent for little more than a year, the company was wound up under supervision. For three quarters of a year more he was employed by the liquidators in the winding-up, and was then discharged:—*Held*, that C. was entitled to his salary for five years, and that, having regard to the fact that the liquidators were indebted to him for his services rendered in the winding-up, in a sum nearly as large as the amount due from him in respect of calls upon his shares, they would not be allowed to enforce against him any claim for such calls until the amount due from them to him had been ascertained.—*In re the London and Colonial Co. (Lim.) (Ex parte Clark)*, 38 L. J. Ch. 562.

NEGLIGENCE—Master and Servant.—Deft., a wine merchant carrying on business in the Minories, sent his clerk in a cart to Blackheath to deliver wine and bring back empty bottles. The cart had reached King William Street on its way back, when the clerk persuaded the carman to drive to the clerk's house near the City Road, upon private business of his own. The cart, while in the City Road, and about two miles out of its way, ran against and injured the plaintiff:—*Held*, on the authority of *Mitchell v. Crasswell*, 22 Law J. Rep. (N.S.) C.P. 100, that, as it appeared the driver had started on an independent journey for a purpose unconnected with his master's business, defendant was not liable for the consequences of the accident.—*Storey v. Ashton*, 38 L. J. Q. B. 223.

COUNTRY BANKER'S CHEQUES.—A country banker who receives from a customer a cheque upon a banker in another town, is not bound to send it to that town for presentation, but may send it to his London agent to pass through the clearing house.—*Prideaux v. Criddle*, 20 L. T. Rep. N.S. 695; 38 L. J. Q. B. 232.

NEGLIGENCE—Railway company—Passenger—Evidence.—Plt. went to the station of defts., intending to travel by their line to C. A train had started previously, and, on inquiring of a porter when the next train for C. would start, plt. was directed to go to a time-bill hanging outside of the door of the booking-office and under a covering or portico. While standing looking at the time-bill, he received an injury from a plank and a roll of zinc which fell through the covering, and upon looking up he saw the legs of a man protruding through the covering:—*Held*, that there being nothing to show that defts. knew that the covering was insecure, or that the man who was upon it was employed by them, there was no evidence of negligence to go to the jury, and that the plt. must be nonsuited.—*Welfare v. the London and Brighton Rail. Co.*, 38 L. J. Q. B. 241.

TRUCK ACT—Master and servant—Artificer—Payment in cash or goods—Deductions—Doctor's, sick and school fund.—Plt. was a tinman, and defts. were a company engaged in raising coal and making iron. Plt. was verbally engaged by defts., and worked for them for several years. The engagement was that plt. was to work for defts. either at piece-work or by the day, at their option; the piece-work being them aking of kettles, etc., at fixed prices, out of materials supplied by the defts. at varying prices; the day-work being the repairing of the defts.' buildings. Plt. was paid like the other workmen employed by defts., but was at liberty to perform the piece-work at his own house, and at times worked for other persons. Plt. and the other workmen were paid thus: there were pay days every eight weeks or so, and intermediate draw days; on the draw days cheques for small amounts were given on a bank at about nine miles from the works; on the pay days accounts were made out, in which the cheques were entered as cash advanced, certain

deductions made, and the balance, if any, paid in cash. The cheques were always taken to defts.' shop, where they were exchanged; they were exchanged in the proportion of 4s in the pound in cash, the rest in goods; and it was well understood that a workman not taking them to the shop would be discharged. The deductions made from plt.'s wages were for the materials supplied for his piece-work, certain coal he wanted, and doctor's, sick and school fund:—*Held*, first, that plt. was obliged to give his personal services, and was therefore an artificer within the Truck Act, 1 & 2 Wm. IV., c. 37; secondly, that the payment by cheque was a subterfuge, and plaintiff entitled to recover the wages paid in goods thereunder; thirdly, that he could not, however, recover as to deductions for materials and coals; fourthly, that, as there was no writing, he could recover as respects the deductions for doctor's, sick and school fund.—*Pillar v. Llynvi Coal and Iron Co. (Lim.)*, 38 L.J. C.P. 294.

NEGLIGENCE—*Injury to consignee using premises of carriers, but departing from ordinary mode of user.*—A coal depot of a railway company had a railway siding, under which were cells into which the coals were tipped from the trucks, so as to fall into the carts of the consignees, which were backed into the cells from a roadway which was at a lower elevation than the railway. It was the practice of persons coming to receive the coals to assist defts.' servants in tipping their coal, and for that purpose they passed along a flagged pathway on the siding running by the side of the trucks. Some coals arrived consigned to the plt., who went to receive delivery, but found that his truck could not be tipped as the cells were all full. With permission of the station-master, he passed along the flagged pathway till he came to his coals, stepped on to the buffer of the truck and threw down some pieces of coal to the roadway, where his servant was with a cart. He stepped back on to the flagged way, and one of the flags which was in an insecure state gave way, and he fell into one of the cells and was injured:—*Held*, that, although plt. in getting his coals was not doing so in the ordinary mode, yet defts. were under the same obligation to provide for his safety as if he had been pursuing the ordinary mode, and that he was not a mere licensee, but engaged with the consent of defts. in doing something incidental to the completion of the contract between himself and defts., in which both he and defts. were bound to take due and reasonable care for his security upon their premises.—*Holmes v. the North-Eastern Rail. Co.*, 38 L.J. Ex. 161.

SALE OF SHARES—*Rules of Stock Exchange—Privity of contract.*—Deft. had bought a certain number of shares in a joint-stock company, and his vendor subsequently bought a like number of the same shares from plt.; both these purchases were made subject to the rules of the Stock Exchange. Upon arrival of the name day, deft.'s vendor gave deft.'s name to plt. as that of the ultimate purchaser of the shares. Plt. executed a transfer of the shares to deft., and delivered it with the share certificates to him. Deft. kept the transfer and certificates, but never executed the former. Calls were subsequently made on the shares, and plt. was obliged to pay them. He therefore brought an action against deft. for an indemnity. The declaration in the action alleged an agreement between plt. and deft., that in consideration that plt. would sell and transfer the shares to deft., deft. would accept and pay for them and indemnify plt. against all subsequent liabilities and calls in respect of them:—*Held*, per *Kelly C.B.* and *Pigott, B.*, that a con-

tract existed such as was alleged in the declaration, and plt. was therefore entitled to recover in the action. Per *Channell, B.* and *Cleasby, B.*, that no such contract existed, and therefore plaintiff could not recover.—*Davis v. Haycock*, 38 L. J. Ex. 155.

BOTTOMRY BOND—*Total loss*—*Constructive total loss*—*General average*.—The condition of a bottomry bond provided that the obligation should be void if the obligors should pay, "in case of loss of the ship or vessel, such an average as by custom should have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed" in consequence of the perils of the seas, etc. The vessel, during her voyage, was obliged to put into port in a damaged state, and was there sold for a sum less than the amount of the bond under circumstances which it was admitted would, as between assurers and assured, have constituted a constructive total loss:—*Held*, that, upon the true construction of this condition; the loss was not "a loss" within the meaning of the condition, and that the holders of the bond were entitled to the whole proceeds of the sale of the ship.—*Stephens v. Broomfield; the Great Pacific*, 38 L. J., Adm. 45.

COLLISION—*Compulsory pilotage*—*Passenger ship*.—Owners are not exonerated from responsibility for the default of a pilot whom they have selected and placed in charge when there was no obligation imposed on them to take such pilot and put him in charge. In a cause of damage it appeared that at the time of the collision the master of the damaging ship had on board his wife and his wife's father. They were on board by the invitation of the master and without the privity of the owners, and they paid no fare till after the collision:—*Held*, that they were not passengers within the meaning of s. 379, of the Merchant Shipping Act 1854, which exempts certain ships when not carrying passengers from compulsory pilotage.—*Owners of Lion v. Owners of Yorktown; The Lion* (P.C.), 38 L.J., Adm., 51.

RAILWAY COMPENSATION—*Lands Clauses Act*—*Railway Clauses Act*—*Vibration*.—An action was brought against a railway company to recover an amount assessed by a jury, as a compensation "for vibration from the use of the railway after construction." The damage did not arise from negligence, but was the inevitable consequence of the proper and ordinary use of the railway:—*Held* (rev. the judgment of Exch. Ch.), that, *first*, no action would lie for the damages sustained; for the Legislature having given power to the company to employ locomotive engines, if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law that *cuiusque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*, it must be taken that power is given to cause that vibration without liability to an action.—*Rex v. Pease*, 4 B. & Ad. 30, and *Vaughan v. Taf Vale Railway Company*, 5 H. & N. 679, approved. *Secondly* (Lord Cairns diss.), that there was no title to compensation for the damage sustained; for the Railway Clauses Act 1845 (8 & 9 Vict., c. 20), ss. 6 and 16, provides compensation only for damage caused by the "construction," and not by the "use," of the railway. The headings to the groups of sections in the above Act indicate the general object of the provisions immediately following, and may be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading. The

Lands Clauses Act 1845 (8 & 9 Vict., c. 68) has no direct bearing on the above question.—*Hammer-smith & City Ry. Co. v. Brand*, H. of L., 21 L. T. Rep. N. S. 238; 38 L. J. Q. B., 265.

ELECTION—Barrister's Court Money—Bribery—Agency of a Registration Association—Treating—Employment of Voters.—It is not illegal to assist persons in getting their names on the electoral register. But where, under colour of so assisting persons, payments are made with the intention of influencing the votes of such persons, it is bribery; and for the purpose of discovering the intention, the important elements for consideration are, first, whether the payments were made contemporaneously with the registration; and, secondly, whether they were remuneration for payments out of pocket, so that the voter should not be a loser, or whether it was intended to give him a profit. An association, admittedly the agents of the respondents, made certain payments to voters for attending the barrister's court. These payments were made contemporaneously with the registration, and amounted to no more than loss out of pocket. No evidence, however, of particular precaution being taken to ascertain the *bona fide* nature of the claims to payments was given beyond the statement of the members of the association making the payments, that they were intended for payment of loss out of pocket to persons who had actually attended the Court:—*Held*, that these payments did not amount to bribery. Such payments, when the registration occurs close before a parliamentary election, must be suspicious, and, with a very little added, must justify the conclusion that they were intended to influence the election. At the time when the revising barrister was sitting, many persons who attended his Court were treated to meat and drink by the association, but there was no evidence that the treating continued beyond the day of registration:—*Held*, that, although foolish and unwise, the treating was not corrupt; but that had the object been to procure popularity or votes at the parliamentary election, it would have been corrupt. The municipal contest occurred a fortnight before the parliamentary. At the former, the customary amount of treating at public-houses went on, in a great measure under the superintendence of the agents of the association, who were also active partisans of the respondent at the Parliamentary election:—*Held*, that although this treating might have influenced the parliamentary election, yet, inasmuch as it was not in excess of treating at other municipal elections, and there was no evidence to show a corrupt intention, it did not affect the parliamentary election. Lavish personal expenditure in a neighbourhood for the purpose of gaining influence is not illegal. To render it corrupt it must be made with a view of influencing particular votes. Where a small isolated act of treating is proved to have been done, more evidence of agency is necessary to fix the member, than where the treating is more extensive. It is not necessarily bribery to give a job to a voter of opposite politics just before an election. Where this was done, and the intention to influence the vote was denied, the act was held to be innocent.—*Hastings Election Petition*, 21 L. T. Rep. N. S. 235. Blackburn, J.

COALITION—Agency—Undue influence—Treating—Employment of persons guilty of undue influence.—There being a coalition between candidates, the agent of one becomes the agent of the other; and if a corrupt act is brought home to the one, both are unable to hold their seats. But personal corruption must be proved against each individually; the proof personally against the

one does not prove it personally against the other. Doing or threatening violence to an elector to induce him to vote or refrain from voting, vitiates the election, although done by an agent only. And if that is done which a man has a perfect right to do, but with a view to influence a vote, it is intimidation. *Ex. gr.*, if a landlord threatens to turn out, or does turn out, a tenant for his vote, that is inflicting harm or loss within the statute. An employer who dismisses his servant on account of his vote is also guilty of undue influence. Whether the withdrawal of custom from a tradesman, or a threat to withdraw it, amounts to undue influence, is a question of degree. *Semble* where the loss proposed to be inflicted in this way would seriously affect the saleable value of the goodwill of a business, it would be such a loss as is contemplated by the statute. The loss must be so serious that a judge could direct a jury in a criminal court that a person threatening to inflict, or inflicting it, was guilty of a misdemeanour. A threat to exercise undue influence must be deliberately uttered, with the intention to carry it into effect, and not in a moment of anger; whilst the loss to be inflicted must not be too remote. An act of treating under sec. 23 of 17 and 18 Vict., c. 102, does not affect the election. If it comes within the 4th section it will affect the election. But the candidate will be responsible if he is in any way accessory to the giving or providing of refreshment corruptly, *i.e.*, with the view of influencing votes at the election then pending. The question whether the intention was to influence votes must depend upon the circumstances and the manner in which the refreshment was given, the time when it was done, and very much upon the nature of the entertainment. The difference between the giving of meat and the giving of drink considered. There is no law which prohibits the giving of feasts to electors after the election. The authority of a person requested to canvass, and so made an agent, ceases with the election; and, unless there is something to show continuing authority, that person could not, by giving a feast ten days after the election, upset that election. The 44th section of 31 and 32 Vict., c. 125, says that if any candidate is proved to have personally engaged as a canvasser or agent for the management of his election any person, knowing that such person within seven years previous to such engagement has been found guilty of corrupt practices, the election shall be void:—*Held*, that it is enough if such a person is engaged with the candidate's knowledge:—*Held*, further, that the statute is not confined to paid agents, but the person engaged must be an agent for the management of at least part of the election. P. was scheduled by Bribery Commissioners within seven years, and acted in a way which would have made him an agent for the purpose of affecting the seats of the candidates by ordinary corrupt practices. The candidates, however, both denied any knowledge that he was in the schedule, or that he was acting as the chairman of a certain ward committee. There was no evidence that either candidate had wilfully shut his eyes to the engagement of P., and it was held that the engagement did not affect the election.—*County of Norfolk Election Petition*, 21 L. T. Rep. N. S. 264. Blackburn, J.

PRINCIPAL AND AGENT—*Implied warranty*.—Appellants, two directors of a public company, wrote a letter to respts., their bankers, informing them that C. had been appointed manager of the company, and had authority to draw cheques on the account of the company. At the date of the letter the account was, to the knowledge of appts, overdrawn, they having,

as directors, no authority to overdraw:—*Held*, that there was evidence of an implied warranty on the part of the appts. that C. had authority to bind the company, and that the appts. were personally liable. "If a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not." "He undertakes for the truth of his representation."—(Note for reference: *Lewis v. Nicholson*, 18 Q. B., 503; *Collin v. Wright*, 8 E. & B. 647.) *Cherry v. the Colonial Bank of Australasia*, 38 L. J. P. C. 49.

PRINCIPAL AND AGENT—*Conversion*—*Tenant for life and remainderman*—*Capital and income*.—Testator directed his trustees to allow his estate to remain invested as it might be at his decease, if they should think fit, and subject to such direction, to convert it and pay the income to his widow for her life, remainder over. The trustees proceeded to realize his estate as soon as possible after testator's death, but in the interval certain ships in which he was interested as partner earned freight, and dividends were paid on certain shares held by testator in partnership; on the sale of these ships and shares a considerable profit was also realized:—*Held*, that the tenant for life was not entitled to the freight or dividends or to the profits on the sales as income, but that they formed part of the capital, and that she was entitled to interest thereon from the death of testator.—*Cooper v. Larocche*, 38 L. J. Ch. 591.

CONTRACT—*Telegraphic message*—*Privity of contract*—*Liability for mistake in message*.—Plt., having a cargo of ice at Grimsby, telegraphed to R. & H., at Hull, asking them to make an offer for it, and requesting them to send an answer by telegraph. R. & H. sent to the office of defts. a message for transmission to plt., by which they offered to take the cargo at 23s. per ton. In the reading off the message at defts.' office, in London, a mistake was made in the figures, and the telegram sent to plt. represented the offer as being 27s. instead of 23s. per ton. Plt. thereupon, in acceptance of the supposed offer, ordered the ship to proceed to Hull; she arrived there, but R. & H. refused to receive the cargo, except at 23s. per ton. Plt. brought an action against defts. to recover damages in respect of the injury which he had sustained by reason of the mistake:—*Held* (contrary to judgment in *De Rutte v. New-York, Albany, & Buffalo Telegraph Co.*, 1 Daly, 547; see Scott & Jarnagin's *Law of Telegraphs*, p. 200), that defts. were not liable, the obligation upon them to use due care and skill in the transmission of the message arising out of contract, and there being no contract between them and plt.—*Playford v. United Kingdom Telegraph Co. (Lim.)*, 38 L. J. Q. B., 249.

BILL OF EXCHANGE—*Signature obtained by fraud without negligence*.—In an action by a *bona fide* holder for value of a bill of exchange against deft. as indorser, the Judge directed the jury that if defendant's signature was obtained upon a fraudulent representation that the instrument was a guarantee, and defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if deft. was not guilty of any negligence in so signing, he was entitled to the verdict:—*Held*, a right direction.—*Foster v. Mackinnon*, 38 L. J. C. P. 310.

NEGLECT—*Railway passenger*.—In an action against a railway com-

pany for an injury occasioned by the negligence of the guard of a train, the evidence was that plt. in getting into the railway carriage put his hand on the hinge-side of the door of the carriage, which was standing open, and before he had quite got in and taken his seat, the guard came and, without any warning, slammed the door upon plt.'s hand, and so jammed it between the door and the door-post. It appeared from plt.'s evidence that there was no handle to get into the carriage by, or at least none which could be seen, it being dark:—*Held*, aff. decision of Court below, that there was evidence of negligence on the part of defts., and that there was not such clear evidence of contributory negligence on the part of plt., that the Judge at the trial ought to have withdrawn the case from the jury.—*Fordham v. London, Brighton, and South Coast Rail. Co.* (Ex. Ch.) 38 L. J. C. P. 324.

CARRIERS BY RAILWAY—Packed parcels—Equality clauses.—Plaintiff, a carrier, was in the habit of collecting small parcels and sending them together in large packages by deft.'s railway. Defts. charged different rates of carriage for different classes of goods, the highest charge being for packed parcels. A declaration was required from plaintiff as to the description of his parcels. He declared them as "packed parcels," and was charged and paid accordingly. Plt., finding that other firms sent packed parcels, from whom no declaration was required, and who were charged for them at a less rate, sued the company to recover the alleged excess as for money had and received. On the trial, he gave evidence that the practice of the other firms in sending "packed parcels" was notorious:—*Held*, aff. judgment of Exch. Chamber, (*ante*. vol. x., p. 52; 35 L. J. Exch. 18) that the evidence produced was admissible, and was sufficient to shew that defendants knew of the practice of other firms to pack their parcels, and that with such knowledge they had improperly charged plaintiff with a higher rate of charge, and had thus infringed the equality clauses; and that plaintiff was entitled to recover the amount so charged in excess in an action for money had and received.—*Great Western Rail. Co. v. Sutton* (House of Lords), 38 L. J. Exch. 177.

FRIENDLY SOCIETIES ACT—Trades' Union—Restraint of Trade.—A mutual society which, in addition to rules for the *bona fide* relief of sick members, and for other ordinary purposes of a friendly society, includes also rules for the encouragement, relief, or maintenance of men on strike, is not a friendly society within the 18 & 19 Vict., c. 63 (The Friendly Societies Act 1855). By one of the rules of the "Amalgamated Society of Carpenters and Joiners," it was provided that "any free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council, shall be entitled to the sum of 15s. per week":—*Held*, per Cockburn, C.J., and Mellor, J., that this rule being ambiguous, and being in their opinion, according to the evidence in the case, construed and applied by the society so as to render the funds of the society available for the purpose of supporting "strikes," the society was not within the protection of the above-mentioned enactment:—*Held*, per Hannen and Hayes, J.J., that the rule was not ambiguous but perfectly plain and lawful, and that as in their opinion the evidence in the case does not show any illegal action under it, the society was within the protection of the said enactment. Per Hannen, J.—Strikes are not necessarily illegal. The legality or illegality of a strike must depend on the means by which it is enforced, and its objects. It may be criminal, as if it be a part of a combination for the

purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement, depriving those engaged in it of their liberty of action; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling fulfilment of an engagement entered into between employers and employed, or any other lawful purpose.—*Farrer v. Close*, 20 L. T. Rep. N. S. 802; 38 L. J. Mag. Ca. 132. [See 32 & 33 Vict., c. 61, since enacted].

WEIGHTS AND MEASURES—Bread Act—Fancy Bread.—The 6 & 7 Will. IV., c. 37, s. 4, enacts that all bread sold beyond the limits of the metropolis is to be sold by weight, except "bread usually sold under the denomination of French or fancy bread or rolls." Appt. was convicted of selling otherwise than by weight bread which at the time of the passing of the Act was usually sold under the denomination of fancy bread, but which at the time of the sale had ceased to be sold under that denomination:—*Held*, by the majority of the Court (*Lush, J.* and *Hayes, J.*), that the conviction must be affirmed, as there was nothing to shew that the legislature intended to specify a particular kind of bread, and say that because it was then an article of luxury it should be so regarded for all time, and because if what was ordinary bread at the time of the conviction was to be treated as exceptional and an article of luxury because it was so at the date of the Act, the enactment would become a dead letter. By *Hannen, J.* (dissenting), that this construction was erroneous, as the object of the statute was to protect the public in the purchase of ordinary household bread, and not those who desired to have a more costly article, baked in a different manner; that the effect of a conviction like the present one would be to make bakers who had sold bread in the same manner since the passing of the Act liable to penalties by reason only of a change in the habits of other bakers and their customers.—*R. v. Wood*, 38 L. J. Mag. Ca. 144.

POWER OF APPOINTMENT—Appointee giving appointor a remote contingent interest.—By articles made upon the marriage of G. D., her father, T. D., covenanted that he and his wife would, in exercise of a power of appointment among their children given to them by their marriage settlement, appoint a share of certain trust funds to G. D., and he also covenanted to give to trustees a bond for the payment of a sum nearly equal to the appointed share. The same articles provided that the appointed funds and the moneys secured by the bond should be so settled as that, in case of default of issue of G. D.'s marriage, the ultimate remainder in them should be vested in T. D. absolutely. In pursuance of these articles T. D. and his wife appointed to G. D. a share of the trust funds, subject to their settlement. T. D. executed the said bond, and the moneys so appointed and secured were settled as agreed. There was no issue of G. D.'s marriage:—*Held*, that the appointment was a valid execution of the power, notwithstanding the contingent interest which T. D., one of the appointors, obtained under it by the above-mentioned arrangement.—*Cooper v. Cooper*, 38 L. J. Ch. 622.

PATENT—Specification in case of successive patents—Part of a combination—Sliding door.—Where a patentee has taken out a fresh patent for improvements on his original invention it is sufficient if, reading his second specification with the first, an artizan would have no substantial difficulty in ascertaining what was claimed. A patent for an entire combination is

not a valid patent for a part when that part would not of itself be patentable, nor (*semble*) when, though new and useful for other purposes, such part has no bearing on the professed object of the patented invention. Therefore, when the subject of a patent was declared to be an invention for producing "a glazed lamp, the frame of which shall throw little or no shadow, and yet at the same time possess the requisite strength and also facilities for lighting and cleaning:"—*Held*, per James, V.C., that the substitution of a sliding door for a hinge, which diminished the danger of breakage, but gave no facilities for lighting and cleaning, and had nothing to do with the strength or the shadow, was not protected by the patent. *Semble*—that there can be no patent right in the mere substitution of a slide for a hinge in the door of a house, of a carriage, or of a lamp. A patent was entitled, for "improvements in the manufacture of railway station and other gas lamps," but the specification claimed only (by reference to a former specification) improvements in "that class of lanterns suitable for suspension in railway stations and other public places." Whether the patent was confined to lamps suspended, *quære*.—*Parke v. Stevens*, 38 L.J. Ch. 627.

WINDING-UP OF COMPANY—*Losses occasioned by misconduct of Directors*—*False balance-sheets*—*Dividends improperly declared*—*Loan to Directors*.—The deed of settlement of a banking company provided that if at any time the losses of the company should have exhausted the whole of the surplus fund and also one-fourth of the paid-up capital of the company, the directors should, as soon as possible, call a special general meeting of the proprietors, and submit to it a full statement of the affairs of the company; and if it should appear at such meeting that the losses of the company had exhausted the surplus fund and also one-fourth of the paid-up capital, the company was to be dissolved. Losses having been incurred to the extent of more than one-fourth of the paid-up capital, a special meeting was called, in 1842, at which it was resolved that the company should go on, and from that time till 1863 the company continued to be carried on, the directors issuing favourable balance-sheets and declaring dividends. Further capital was lost, but no meeting was called again, and when the company was wound up, in 1863, the debts very considerably exceeded the assets. Upon a bill filed by the official liquidator, seeking to make the directors liable for the losses subsequently incurred, it was held (rev. decision of the *Master of the Rolls*), that as the shareholders were aware of the position of affairs when it was resolved to continue the bank, the directors were not liable for not calling another meeting and stopping the concern. The bill also sought to charge the directors with the loss sustained by allowing one of themselves to withdraw his account:—*Held* (rev. decision of *Master of the Rolls*), that as this was within the powers conferred on the directors by the deed of settlement they were not liable, and the bill was dismissed without costs.—*Turquand v. Marshall*, 38 L.J. Ch. 639.

LIBEL.—A charge of ingratitude is actionable as libel; and though facts be stated as the ground of the charge which do not warrant the opinion founded on them, the charge may still be libellous by raising a doubt whether there are not other facts justifying the charge. Therefore, though the charge be coupled with statements tending to explain it, it is still a question for the jury whether the words were used under such circumstances as to make them libellous.—*Cox v. Lee*, 38 L.J. Ex. 219.

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ON MERCANTILE GUARANTEES.

By J. GIBSON STARKE, ADVOCATE.

THE Law of Guarantee forms a very important though limited part of the law of cautionry, and in offering a chapter upon the subject, we have endeavoured to explain, as carefully as possible, the present state of the law both in this country and in England. It forms a striking peculiarity in the history of the law of cautionary obligation, that while in this country it has rested until very recently upon common law, in England the Statute of Frauds (temp. Charles II.) not only made writing obligatory in all such contracts, but so defined their nature that it is still the basis upon which all modern legal decisions are being raised in that country. Having examined all the important cases bearing upon the subject, we have attempted a more systematic classification of these than will be found elsewhere.

I. Nature and Constitution.

The chief purpose of a letter of guarantee is to enable persons who are ignorant regarding each other's pecuniary resources to enter into mutual mercantile transactions. There are, in its simplest form, three persons interested in the engagement, viz., the proposed debtor and creditor, and the cautioner (guarantor), who interposes his own credit on behalf of the former, on the faith of which the other becomes creditor. There may, however, be more than one cautioner, and it is common in transactions involving a large pecuniary risk for a number of persons to become bound on behalf of the principal debtor, which they may do either "conjunctly and severally," in which case they are liable *in solidum*, or simply as cautioners, *i.e.*, *pro rata*, or it may be each for a specific sum attached to their names. If a guarantee is entered into on the express condition that other persons are to be bound as obligants, so as to divide the responsibility and loss, the engagement is not complete until all have signed (*Paterson v. Bonar*, 1844, 6 D. 987; *Scottish Prov. Assur. Co. v. Pringle*, 1858, 20 D. 463; *Craig v. Paton*, 1865, 4 Macph. 192). It forms one distinctive difference between an ordinary bond of cautionary obligation and a

guarantee, that while in the former the cautioners are frequently bound *pro rata* along with the principal debtor, it is opposed to the nature of a guarantee to become liable *with* him for a part only of the debt.

Previous to 1856, there were two points on which the laws of England and Scotland differed in regard to the *form* of constituting a guarantee. First, by the law of England all guarantees required to be in writing,* while in our country this was not essential, and a verbal guarantee, if followed by *rei interventus*, was sufficient,† Stair 1. 17. 3; Ersk. 4. 2. 20. Secondly, by the law of England it was essential that a guarantee should bear *in gremio* to be granted for a consideration, while with us this was not only unnecessary, but in an old case held illegal (*King*, 1711 M. 9461). But by the English and Scottish Mercantile Amendment Acts of 1856 both laws are now alike on these points, it having been enacted by 19, 20 Vict., c. 60, s. 6, that "all guarantees shall be in writing," and by 19, 20 Vict., c. 79, s. 3, that no guarantee shall be deemed invalid "by reason only that the consideration does not appear in writing, or by necessary inference from a written document." But although all guarantees must be in writing, no special form is enjoined, except that it "shall be subscribed by the person undertaking such guarantee, or by some one duly authorised by him or them." If it relates to the purchase or sale of goods, no stamp is required,‡ and it will possess all the privileges common to writings in *re mercatoria*.

A guarantee may thus be defined as any explicit terms of writing whereby the granter so identifies his own pecuniary credit with that of a third party proposing to become debtor in a business transaction, that on failure of the latter to implement the same, the granter stands legally liable to the creditor. It is a collateral obligation so to answer as distinguished from an original and direct engagement for the granter's own act, and it is therefore of the essence of this contract that there be some one else liable as principal debtor. If there be no such third party, then the granter of what bears to be a letter of guarantee, though he may be bound to implement the transaction, will not be entitled to any of the equities of a cautioner. This is well illustrated by the recent case of *Milne v. Kidd*, 1869, Scot. Law Rep., vii. 149. In this case the defender, along with several others, subscribed and sent a letter to the directors of a railway company undertaking that in the event of the pursuer, who was secretary to the company, being *allotted* a certain number of shares in a new line proposed to be constructed by the company, they would, on completion of the works and after it had been open three years for traffic, relieve the pursuer of the shares by purchasing them at

* 4th Sect. Statute of Frauds (29 Car. II., c. 3).

† *Rei interventus* will also validate a cautionary obligation executed in Scotland but authenticated according to the English form of attestation. *Ch. of England Assurance Co. v. Wink*, 19 D. 414; *United Mutual Assurance Co. v. Murray*, 22 D. 1195.

‡ *Warrington v. Furber*, 8 East, 242; Add. on Contracts, 6th edit., p. 860.

par, with interest at the rate of 5 per cent. upon the calls which he had paid upon them from the dates of such payments. The pursuer accepted this offer, obtained the required number of shares, and at the end of the time stipulated by the letter of guarantee, he not being able to sell the shares except at a discount, asked the defenders to implement their obligation. The defenders refused to do so on the grounds:—1. That the shares had not been really “allotted” to the pursuer, but were shares that had been forfeited by another party, and so acquired by him. 2. That subsequent to the date of the guarantee new Parliamentary powers had been obtained by the railway company which materially altered the nature of the transaction, and that as these changes had not been intimated to them they were not liable under the letter of guarantee. The Court, however, unanimously held that there was here no cautionary obligation, the pursuer being one of the company, and his position as such known to the defenders at the date of their proposals; that the undertaking was only a mutual agreement containing reciprocal stipulations, and that the pursuer having fulfilled his part of the agreement, the defenders were bound to implement their share according to the terms of the letter of guarantee, and without any of the equities of a cautioner.

The soundness of this decision cannot, we think, be doubted. Although there were nominally three parties to the transaction, there were, in point of law, only two, and, even were it otherwise, yet so soon as the railway company parted with their shares for a consideration which satisfied them, they ceased to stand in the position of a creditor. It therefore matters little whether the defender had at the outset viewed the pursuer as one of the company or as a separate party.

This leads us to observe another distinguishing feature of all cautionary obligations—viz., that a person can only be cautioner to another so long as that other *continues* liable to a third party. Whenever that liability ceases, a cautionary obligation no longer exists. The same distinction seems to apply to what are called *del credere* guarantees. Although treated in some of our text books as cautionary obligations, they are not so either in form or substance. It is a mere agreement between a factor and his principal, whereby, for an additional premium on the usual commission, the former undertakes to find solvent purchasers for the goods of the latter, who accordingly entrusts him with their sale. There are no known third parties at the time of entering into the engagement—otherwise the principal would not require to give any premium to another to sell, and it is the sale of goods which the factor primarily undertakes, and not the debt of another. It is an original independent contract by which the factor becomes absolutely liable to the principal for payment of the price of the goods he sells. Hence it has long been held in England that *del credere* engagements are not within the 4th section of the Statute of Frauds, and so do not require to be in writing (*Couturier v. Hastie*, 1853, 8 Exch. 40; 22 L. J. (Exch.) 97; and

see especially the opinion of V. Chancellor Wood in case of *Wickham v. Wickham*, 1855, 2 K. and J. 478; also Addison on *Contracts*, 6th ed., p. 59).*

There is still another class of documents of frequent use among merchants which must be carefully distinguished from a guarantee—viz., Letters of Recommendation. The great distinction between these two is, that whereas a guarantee makes distinct reference either to a particular transaction or course of dealing, it gives at the same time such an assurance of safety in regard to its being entered into as to create an unmistakable pecuniary responsibility on the part of the granter. A letter of recommendation supports credit by reference to general character only, and unless proved to be, *ab initio*, fraudulent or false in its terms, infers no responsibility whatever (1 Bell's Com., 371). The distinction between them accordingly will best appear by observing the nature of the transaction referred to, and whether the terms of the letter give prominence to that, or mainly to the character of the party proposing to enter into it. The most instructive case on this point is *Rankine v. Murray*, May 15, 1812, 16 F. C. 562, in which the whole Court was consulted and much divided in opinion, but the judgment of Lord Succoth seems to us best to explain the broad distinction between the two documents. We agree with that judgment in considering the letter in question one of recommendation only, and we observe a similar view is expressed by Professor Moir upon the case (see Guthrie's *Erskine's Princ.*, 374, note).

A guarantee becomes binding upon the granter of it so soon as it is voluntarily transferred to the intending creditor, and the transaction to which it refers has been entered into by him. It can be recalled so long as it has only been delivered into the possession of a neutral party. (*Douglas, Heron, & Co. v. Grant*, 1774, 2 Pat. App. 351). Where the guarantee is future in its application, and uncertain as to amount, it seems, however, right that the guarantor should have some intimation of its acceptance, on the principle that such transactions when entered into should be known to all parties interested (*Parsons on Contracts*, ii. 13). But notice is not necessary where the acceptance is contemporaneous with the guarantee or the guarantee is absolute in character. A mere offer to guarantee is insufficient until notice be given of its acceptance (*M'Iver v. Richardson*, 1 M. and S. 557).

It is essential to the legal validity of all guarantees that at the time of entering into the engagement there be perfect fairness of representation by the principal debtor to the cautioner, and where any stipulations are made, or plainly implied, they must be observed, otherwise the cautioner will be free. (*Loudon v. Jackson*, 1825, 3 S. 558; *Smith v. Bank of Scotland*, 1829, 7 S. 244; Bell's Pr. 251; 1 Bell's Com. 373).

* By the law of England there is no action of *assumpsit* as upon a guarantee where, without any writing, A. goes to B. and prevails upon him to send goods to C., by assuring him that he shall be paid for them (*Smith's Merc. Law*, 7th ed., 465).

II. Construction.

The chief object of guarantees being, as we have observed, to facilitate, and, at the same time, render commercial transactions secure, it behoves that they be carefully framed, so that this end be not frustrated, and the parties suffer an unexpected loss.

In construing a guarantee, the general rule is that its terms must be strictly adhered to, yet never so as to over-ride its fair import and the manifest understanding that exists between the parties. It is always presumed to apply only to future transactions, but may be framed either with reference to a succession of future dealings—in which case it is called a *continuing* guarantee—or as limited to a specific and single transaction. In the interpretation of these documents it is, therefore, important to observe any limitation in regard to either time,* the transaction, or person referred to, and it may be useful to give the following more specific rules on these points as deduced from reported cases:—

1. A guarantee is presumed to apply only to future dealings, unless the contrary be expressed. (*Glyn v. Hartel*, 1818, 8 Taunt. 208;† *Dykes v. Watson*, 1825, 4 S. 69; *Houston's Executors v. Speirs*, 1826, 4 S. 566).

2. Where a single transaction is named, or distinctly referred to, the guarantee will be held as limited to that transaction alone. (*Crichton & Co. v. Jack*, 1797, M. 8229; *Scott v. Mitchell*, 1866, 4 Macph. 551).

3. Where a guarantee refers to any transaction which, by its nature, implies successive dealings, it will be held a continuing one, so as even to cover balances in the transactions, and limited only to the sum which may be specified. (*Sir W. Forbes v. Dundas*, 1830, 8 S. 865; *Houston's Executors v. Speirs*, 1834, 12 S. 879; *Caledonian Bank v. Kennedy's Trustees*, 1870, Scot. Law Rep., vii. 550).

4. Where the terms of a guarantee are general as regards the transaction, but limited as to the pecuniary value, the guarantee will be considered a continuing one so long as the sum named is not over-drawn. The word "any," as qualifying the transaction, has been repeatedly held to have this effect. (*Merle v. Wells*, 1810, 2 Camp. 413; *Mason v. Pritchard*, 1810, 2 Camp. 436; *Bastow v. Bennett*, 1812, 3 Camp. 220; *Barr v. Downie*, 1840, 3 D. 59; *Tennant v. Bunten*, 1859, 21 D. 631).

5. Where the terms of the guarantee are general both as to the transaction and sum, it will be binding on the granter until recalled. (*Kembles v. Mitchell*, 1831, 9 S. 648; *Veitch v. Murray*, 1864, 2 Macph. 1098).

6. Where, from the general tenor of the whole document, there is an ambiguity or contradiction, real or apparent, in regard to the time

* Guarantees do not fall under the statute 1695 c. 5, *Alexander v. Badenoch*, 1843, 6 D. 322, and old cases cited there.

† Also *Mcville v. Hayden*, 3 B. and Ald. 593; *Kay v. Groves*, 6 Bing. 276; *Nicholson v. Paget*, 1 C. and M. 48.

over which the transaction is to extend, then the understanding of the parties, as inferred from their dealings upon the guarantee, will give the interpretation—always giving a construction as favourable as possible to the cautioner. (*Baird v. Corbett*, 21st Nov., 1835, 14 S. 41).

7. A guarantee granted for a specific sum, though bearing to be so only on condition that credit be given to the principal debtor for a larger sum than the guarantee bears, will be held binding on the granter so soon as dealings have been entered into to the value of the lesser sum named. (*Fraser v. Henderson & Co.*, 3 June, 1870; Scot. Law Rep., vii. 516.)

8. The well-known usages of trade will over-rule any other more rigid construction. (*Slade & Co. v. Knox*, 1808, Hume, 95; *MacLagan v. Macfarlane*, 1813, 17 F.C., 451; *Forbes v. Macnab*, 1816, 19 F.C., 137).

9. Guarantees are held as limited to the persons to whom they are addressed, the granter being presumed to have relied upon the party's individual judgment in the transaction. (*Stewart v. Scott*, 1803, Hume, 91; *Philip v. Melville*, 1809, 15 F.C., 204; *Elton, Hammond, & Co. v. Neilson*, 1812, 16 F.C., 699).

This last rule has been extended by statute (19, 20 Vict., c. 60, s. 7) to guarantees granted to or for a company or firm, whether consisting of one or more persons trading as such, so that "no guarantee shall be binding on the granter after a change has taken place in any one or more of the partners unless the contrary intention shall appear, either by express stipulation or by necessary implication, from the nature of the firm, or otherwise." The term "necessary implication" would, Mr Moir thinks, cover the case of joint-stock companies, where, from the perpetual fluctuation of partners, the guarantee would be held as granted on the understanding that its validity would not be affected by such changes. (Guthrie's Ersk. Pr., p. 374, note).

III. Discharge.

The Statute 1695, c. 5, which limits the endurance of certain cautionary obligations, does not apply to mercantile guarantees, but with this exception, the same principles which regulate the discharge of the former apply also to the latter.

1. A discharge of the principal debtor by the creditor without the cautioner's consent will also discharge the cautioner. But this rule does not hold where the principal debtor is bankrupt, and the creditor either accepts a composition or grants a discharge, 19 and 20 Vict., c. 79, s. 56. (*British Linen Company v. Thomson*, 15 D. 314). And where the discharge is qualified by an express reservation of the claim against the cautioner, so that his claim of relief is not cut off, the cautioner will still be bound. (*Ogilvie v. Smith*, 1825; 1 W. and S., 315).

2. Any discharge granted by the creditor to one of several cautioners, without the consent of the others, discharges all the cautioners, 19 and 20 Vict., c. 60, s. 9. (*Church of England Assurance Company v. Wink*, 1857, 19 D. 1079).

3. The renunciation by the creditor of any security held by him over the principal debtor's estate, will discharge the cautioner to the extent of the value of such security. (1 Bell's Com. 359).

4. Liberation from prison by the incarcerating creditor has been held to discharge a cautioner. But a creditor, who has only begun, may depart from completing personal diligence against the debtor without discharging the cautioner. (Ersk., ii. 3, 66).

5. An agreement on the part of the creditor, without consent of the cautioner, to "give time" to the principal debtor, will discharge the cautioner. (Bell's Pr. 262; Addison on *Cont.*, 6th ed., 567).

6. Gross neglect of proper legal proceedings on the part of a creditor against the principal debtor will free the cautioner. (Bell's Pr. 263).

ON THE CONFLICT OF LAWS ADMINISTERED BY THE SUPERIOR COURTS OF GREAT BRITAIN.

No. VIII.—CIVIL JURISDICTION—*Continued.*

THE fourth and last great division of the grounds of jurisdiction known to the law of Scotland I have marked by the expression

(4.) *Forum Remedii*.—Apart from the grounds of jurisdiction assumed by our Courts in imitation (as they imagine) of the rules of jurisdiction prescribed by the Roman law for the Courts of the different provinces, there is another ground on which the Supreme Court in an independent political society must, *ex necessitate*, maintain jurisdiction. This is simply the power of the Court to enforce any decree which it may issue against the person or property of the defender within their jurisdiction. The ground of jurisdiction so originating in our former isolation holds good with regard to the sister country notwithstanding the union of the kingdoms; and, although at the cost of occasional inconvenience and surprise, is perhaps usefully retained so long as all other anomalies of the juridical relations between the two countries are preserved. I shall consider this ground of jurisdiction under the following subdivisions: (a) arrestment of the person *in meditatione fugae*; (b) arrestment of the goods *ad fundandam jurisdictionem*; (c) liability to attachment, by diligence, of heritage in Scotland.

(a) The power of a Court or Judge to imprison the person of one within their jurisdiction is one of the most familiar means of enforcing the order of a Court or Judge. This is exemplified by the practice of the Court of Chancery in England, who are accustomed to exercise jurisdiction, not only if the defendant is within the jurisdiction of the Court at the time of filing the bill, but even if there is reasonable probability that he will come within the jurisdiction and remain there, so that the proceedings may be effectually enforced against him. The Scotch Courts have never asserted a jurisdiction

so comprehensive as this; but where the creditor has ground to suspect that his debtor is *in meditatione fugae*, and intends to withdraw suddenly from the kingdom, and so disappoint his creditors, and if he declare such suspicion on oath, a warrant may be granted for arresting and securing the person of the debtor until caution be found *judicio sisti* (Stair, iv. 47, s. 23; Ersk. Inst., i 2, 21).

The arrest upon a *meditatione fugae* warrant founds jurisdiction independently of any bond of caution *judicio sisti* which may follow upon it. The strict course of proceeding is this. The creditor makes application to the Judge Ordinary or other magistrate of the jurisdiction within which the debtor is found. This application is supported by the oath of the creditor to his belief that the debtor intends to leave the country in order to defeat his claim, specifying the grounds of that belief, and (unless the debt be instructed by probative writing) deponing to the truth and particulars of his demand. If the creditor himself be out of Scotland, his affidavit must be ratified by his mandatary in Scotland swearing conformably and justifying the oath by circumstances. The Judge or magistrate being satisfied that a *prima facie* case is made out, grants warrant for apprehending the debtor for examination, and if, on such judicial examination, and the other evidence before him, he find the *meditatio fugae* proved, he grants warrant for imprisonment of the debtor until he find caution *judicio sisti* (Bell's Com., ed. Shaw, pp. 1087, 1092). If the debtor, after being so arrested for examination, waive some part of the regular procedure, and voluntarily promise to give security *judicio sisti*, and be liberated on such promise, the *nexus* created by the arrestment will continue to attach to the effect of creating jurisdiction, even though some part of the terms on which such liberation took place may have been departed from (*Muir v. Collett*, June 28, 1861, 23 D. 1229). It is enough that action be instituted without delay for enforcing the debt on which the original application was grounded. The judgment in *Muir v. Collett* is very instructive. It proves that the jurisdiction is founded by the arrest of the person, and not merely by the bond *judicio sisti*. That this is the *ratio decidendi* of *Muir v. Collett* is expressly stated by Lord Curriehill in *Morison and Milne v. Massa*, 5 Macph. 136; and it is quite in accordance with the notion of the process as described by our institutional writers. If, however, the debtor himself, as frequently happens, becomes a party to a bond *judicio sisti*, such bond will be a bar to the debtor's objecting to the jurisdiction, although no arrest has been actually made of his person; and if he have executed the bond without having been actually arrested upon the *fugae* warrant, I do not think it could be reduced as granted under duress. At all events, reduction of such a bond, to have any chance of success, should be instituted immediately upon stating his objection to the jurisdiction (*Irvine v. Hart and Son*, Mar. 19, 1869, 7 Macph. 723).

Of a similar nature with the arrestment *de meditatione fugae*, was a practice formerly in use of arresting on a *border warrant*, which,

as Erskine says, was granted (of course) by the Judge Ordinary of either side against debtors who have their domicile on the opposite side, for arresting not only their goods but their persons till they give security *judicio sisti*. Although there is no authority for saying that these warrants are in law obsolete, I question whether since the case of *Landell v. Landell* (reported 16 S. 388) any one has ventured to imprison his debtor on such a warrant. In any case where imprisonment could be justified by necessity, it would be practicable and much safer to obtain a warrant *de meditatione fugae*, and to follow it by an action in the Court of Session. So far as border warrants may be still in use for attaching the goods so as to make the defender amenable to the jurisdiction of a Judge Ordinary on this side the border, they are not within the scope of the present papers, which profess to deal only with the jurisdiction of our Superior Courts. Such attachment is precisely analogous to the foreign attachment immemorially used in the cities of London and Bristol (Stephen's Commentaries, vol. iii, p. 706 n); a privilege allowed to an inferior Judge through ancient custom, and maintained on account of its practical convenience.

(b) Arrestment of the goods *ad fundandam jurisdictionem*, or *jurisdictionis fundandae causâ*, is a process for founding jurisdiction, for which warrant is obtained either from the Judge Ordinary or by letters of arrestment *jurisdictionis fundandae causâ* passing the Signet. Either warrant will found jurisdiction against a foreigner or other person out of the jurisdiction, although not subject to the jurisdiction on any of the grounds already treated of (Ersk. Inst., i. 2-19; Menzies' Conveyancing, p. 304). This foundation of jurisdiction was recently tested, by an appeal to the House of Lords, in the case of the *London & North-Western Railway Company v. Lindsay*, Feb. 18, 19, and 23, 1858, 3 Macqueen, p. 99; and it is now incontestable that arrestment *ad fundandam jurisdictionem* is a good foundation of jurisdiction in all actions concluding for payment of money (*Longworth v. Hope*, 3 Macph. 1049). By a majority of the First Division this ground of jurisdiction has been held well laid by the arrestment of a ship *jurisdictionis fundandae causâ*, and sufficient to support an action directed against the master of the ship in his representative character as master, and as representing the owners of the ship (*Morison and Milne v. Massa*, 5 Macph. 130). The Law Peers in the case of the *London & North-Western Railway* avoided any expression of opinion on the question whether the jurisdiction so founded can be made effectual against any property other than that included in the arrestment; but in the subsequent stage of the same case in the Court of Session (Jan. 27, 1860, 22 D. 585) the Lord President expressly denies the meaning of the law to be that the value of the subject arrested is in any degree to be the measure of the effect of the decree. He goes on to say: "The object of the arrestment is merely to fix the subject here so as to give the Court jurisdiction, and then, when the decree comes to be pronounced, it receives effect

in a foreign Court to the same effect as any decree pronounced in a case which the Court has full jurisdiction to deal with." This view, however, seems contrary to that which has formerly found favour in the Court of Session (*Douglas v. Jones*, 9 S. 859; and compare *M'Lachlan v. Rob, etc.*, 9 S. 592).

To explicate this point, it is necessary to distinguish between proceedings in *foro* and proceedings in absence; and as the question lies beyond the limits of actual authoritative decision, it is necessary to consider, step by step, the proceedings and their effect. A pursuer, anxious to have his cause tried in Scotland, and finding the debtor has effects within the jurisdiction, lays on an arrestment *ad fundandam jurisdictionem*, and institutes his action in the Court of Session. The defender, being furth of Scotland, is cited edictally, and the pursuer takes care, pursuant to the A. S., 18th Dec., 1868 (*ante*, vol. xiii, p. 89), to give *reasonable* notice to him at his residence or place of business in England. The defender is then compelled either to abandon any property that he may have in Scotland to such diligence as may be competent to the pursuer upon his action, or he must appear and defend the action. Suppose that he appear, and the pursuer state defences on the merits. Under the old practice, it seems to have been competent to him to appear and state defences on the merits under reservation of a declinator of the jurisdiction, and in the case of *M'Lachlan v. Rob, etc.*, a final judgment seems to have been pronounced sustaining the declinator, after £1000 a side had been spent in discussing the merits (9 S. 588). It is scarcely conceivable that such a miscarriage of procedure would be allowed to occur now; and I presume that any Judge will take care that the defender should not be allowed to insist on a defence on the merits, without the preliminary defences being disposed of or distinctly departed from. Suppose, then, after pleading upon the merits, the pursuer get a decree, which is therefore a decree *in foro*. The pursuer may now not only enforce execution of the decree by diligence against the defender's estate in Scotland, but he may also proceed against his person and estate in England, by registering his decree in the Common Pleas, pursuant to the Judgments Extension Act, 1868, 31 and 32 Vict., c. 54, sec. 3. He thus obtains what is equivalent to a judgment of the Court of Common Pleas without the necessity of giving security for costs (sec. 5); and an attempt by the defender now to prevent execution of the judgment against his property would have to be made by a suit in Chancery for an injunction, or by a motion under the C.L.P. Act 1854 in the Court of Common Law for the same purpose. Now, it is possible to conceive that the act of the pursuer in dragging the defender before the Scotch Court was so oppressive and improper that the English Court would think it equitable to interfere. (See *Baker v. Wait*, L. R. 9 Eq. 106.) And they would probably scrutinise the proceedings in the Scotch Court so as to discover whether there had been not merely formal *litiscontestation* but actual consent on the part of the defender or his authorised agent

to try the merits of the case before the Scotch Court. But if they come to the conclusion that the defender had not only formally entered into *litiscontestation*, but actually intended to allow the merits to be tried in Scotland, the English Court would decline to review the decision. Now, take the other alternative. The defender does not appear, and decree is taken in absence, which has not the privilege of finality under the 24th section of the Court of Session (Scotland) Act 1868—(personal citation being, on the hypothesis, impossible). By the 8th section of the Judgments Extension Act, 1868 (31 and 32 Vict., cap. 54) the case is excepted from the provisions of that Act. The pursuer has, therefore, no remedy in England without an action. And in this action, I think, he must try the merits; for the decree made in Scotland without any *litiscontestation* or decision upon the merits can scarcely be considered such a foreign judgment as would operate any presumption in his favour. And I doubt whether he would in the English action recover any costs of his proceedings in Scotland, which, for English purposes, have been absolutely useless. On the whole, I think that, if it is really of moment to the defender to have the cause tried in England, and if the property which he happens to have in Scotland is not worth defending, he will do wisely not only to avoid stating peremptory defences, but not even to enter appearance—a step which may now entangle him in the consequences of a decree *in foro* (Court of Session (Scotland) Act, sec. 54). Here lies the practical limit to prevent the abuse of this process of arrestment *ad fundandam jurisdictionem* being vexatiously used by the attachment of property of very small value. In the case of *Shaw and Mandatory v. Dow and Dobie*, there was a very small amount (£1 8s 6d) attached, and the Court thought it sufficient for the foundation of jurisdiction as to the petitory conclusions of the action (Feb. 2, 1869, 7 Macph. 449). But there was an important reason for bringing that action in Scotland—namely, that its principal object was to obtain a reduction affecting title to Scotch heritage.

I may observe, that if a pursuer has it in view ultimately to use his decree for execution in England, he should (if there be any other sufficient ground of jurisdiction) avoid the use of arrestment *ad fundandam jurisdictionem*. For, owing to the exception in the Judgments Extension Act already mentioned, his decree, if taken in absence, could not in this case be enforced in England under the provisions of that Act. If an action, in which jurisdiction has been founded by arrestment *ad jurisdictionem fundandam*, has proceeded on edictal citation, without any actual notice to the defender, it would probably be held a mere nullity in an English or in any foreign Court (*Douglas v. Forrest*, 4 Bing. 686, 702, 703; *Story's Confl.*, secs. 546, 549). It may be observed, in conclusion, while upon this question of jurisdiction, that the effect of the arrestment *ad fundandam jurisdictionem* is only to fix the property in Scotland *fictione juris* for the purpose of jurisdiction, and that such process lays no actual *nexus* on the property. To create such *nexus*, it is necessary to

arrest on the dependence, just as in the case where jurisdiction is founded in any other manner.

(c) If the defender is entitled to, or interested in, heritage situate in Scotland, the Court has jurisdiction not only in an action relating to the heritage, but also in any petitory action the decree upon which may be enforced by diligence against the heritage. The principle on which this rule is founded is precisely similar to that of jurisdiction founded on arrestment (*Douglas v. Jones*, 9 S. 859; *Muir v. Collett*, 23 D. 1232; *Shaw & Mandy v. Dow & Dobie*, 7 Macph. 454), the only difference being that the heritage being in the eye of the law immovably situate in Scotland, there needs no legal process to fix its situation *fictione juris* (*Ferrie, etc.*, 9 S. 855). A lease for five years has lately been held to be an interest in heritage capable of supporting jurisdiction on this ground (*Fraser*, Jan. 14, 1870, p. 156 *ante*). But the interest necessary to support jurisdiction on this ground must be a heritable interest, and therefore a reversionary interest in the proceeds of heritage, which has been conveyed to trustees upon a trust for sale, is not such an interest in heritage as will support jurisdiction on this ground (*Bell v. Stewart*, 14 D. 837).

It may be here observed that the exception in § 5 of the Judgments Extension Act, 1868, introduces a new distinction between this ground of jurisdiction and arrestment *ad fundandam jurisdictionem*. For I conceive that a decree in absence may be registered and enforced in pursuance of that Act, although the only foundation of jurisdiction is the interest of the defender in Scotch heritage. And if such a decree were so registered, I think the defender could only get the merits tried by a suspension in the Scotch Courts, unless he could make out such a case of oppression as the English Courts would deem a ground of equitable relief.

In concluding this account of the jurisdiction of the Scotch Courts, it must be observed that the Court of Session, even where it has jurisdiction according to the technical rules of our law, maintains a discretionary power of staying or sisting proceedings, if there is another competent tribunal where proceedings have commenced, and where it is convenient that they should be brought to a conclusion. This discretionary power is discussed in the case of *Longworth v. Hope*, 3 Macph. 1049, under the plea there stated under the improper name of *Forum non competens*. Also in *Thomson v. North British and Mercantile Insurance Company*, 6 Macph. 313, in which the principle is maintained that the Court of competent jurisdiction before whom the cause is first taken, is, in the absence of special circumstances, the convenient tribunal. Another case in which the *convenient* forum is considered is that of *Gillon & Co. v. Dunlop & Collett* (2 Macph. 776). A testator died leaving the bulk of his assets in England and India. One of the executors (C.) was resident in India, and the other (D.) in Scotland. Probate was taken out by both executors in England, and by C. in India. A suit for the administration of the English estate was instituted in the Court of

Chancery in England. There were some trifling assets in Scotland, but no Scotch confirmation was taken out. An action was raised in the Court of Session against the executors for payment of a debt of the deceased; and it was proved that D. had realised Scotch assets of a trifling amount, but not sufficient for satisfaction of the demand in the Scotch action. Proof being given that the Court of Chancery had jurisdiction to secure the English assets for the benefit of the creditors, the Court of Session dismissed the action (*Gillon & Co. v. Dunlop & Collett*, 2 Macph. 776). I imagine that in this case there was no doubt of the sufficiency of the English assets, or that the Scotch assets were too small to be worth fighting about; otherwise, I presume, the Court would have taken the more cautious course of sisting procedure until the issue of the English suit, a course which seems to have been taken in the case of *Wedderburn v. Webster*, mentioned by Lord Deas in his judgment in *Longworth v. Hope* (3 Macph. 1053), and which would be consonant to the course followed by Lord Cottenham in *Preston v. Melville* (8 Cl. and Fin. 15; cf. *Wilmot v. Wilson*, 3 D. 817). The very reasonable principle adopted by the Scotch Courts is, that the Court of competent jurisdiction in which proceedings are first instituted, is presumably the convenient *forum* for their being carried through; and they are accustomed to sist procedure in their own Court, if it be shown that earlier proceedings have been instituted in a foreign Court of competent jurisdiction (*Thomson v. North British and Mercantile Insurance Company*, Feb. 1, 1868, 6 Macph. 310). No such principle, however, is recognized by the Courts of Common Law in England (*Cox v. Mitchell*, 7 C. B., N. S., 55). But the principle is recognised in Chancery (*Elliot v. Lord Minto*, 6 Madd. 16).

Lastly, it may be observed that jurisdiction can be *prorogated* by consent (Ersk. Inst., i. 2, 27). The bond *judicio sisti*, already mentioned, when entered into by the debtor himself, is a species of prorogation; and such a bond often contains a consent to compare before a particular Judge, who would not have been competent merely on the ground of the debtor having been arrested in *meditatione fugae* (Longmuir, 12 D. 926). Prorogation generally is effected by the defender stating defences without objecting to the jurisdiction (Stair, iv. 37, 12).^{*} Consent to registration of a deed for execution does not prorogate jurisdiction (Ersk., i. 2, 28; i. 5, 30); so as to confer judicial powers on the Judge in acts of contentious jurisdiction. And hence, I suppose, a domiciled Englishman entering into a bond with this clause would not thereby subject himself or his effects to the jurisdiction in a charge on the bond. If the debtor has effects within the jurisdiction, his creditor, if he wishes to proceed in Scotland, should attach the goods by arrestment, *ad*

^{*} An opinion has been stated that a foreigner cannot prorogate jurisdiction (*M'Lachlan v. Rob*, 8 S. 588), but I know of no good authority for this dictum. Prorogation, however, cannot take place in the consistorial actions above called actions of *status* (Fraser, parl. rel., p. 697).

fundandam jurisdictionem, and raise an action in common form (cf. *Mackenzie v. Hall*, 17 D. 164; *Don v. Kealey*, 12 D. 1016).

The Court of Session being now competent in causes of every kind, I am not here concerned with questions involving the competency of the Court to the subject matter such as the case of *Forrest v. Harvey* (4 Bell's Ap. 197).

R. C.

THE STATUTES 33 & 34 VICTORIÆ.

CAP. 14. "THE NATURALIZATION ACT, 1870."

THIS statute commences with a reform which was not, we think, one of those recommended by Her Majesty's Commissioners on Naturalization and Allegiance, but which is recommended by its expediency and justice, and which brings the law of this country into harmony with that of the United States, and most of the countries of Europe. Sect. 2 enables aliens to take, acquire, hold, and dispose of real and personal property of every description in the same manner as British subjects; and permits a title to all real and personal property to be derived through, from, or in succession to an alien. This is subject to the following provisos:—

1. Aliens are not, by this section, to be qualified for any office for which they are now disqualified, or for any municipal, parliamentary, or other franchise; nor does it confer on them a right to hold real property out of the United Kingdom.

2. The section entitles to no privileges of British subjects except to rights and privileges in respect of property expressly conferred.

3. It affects no estate or interest, mediate or immediate, in possession or expectancy, in pursuance of any disposition made before the Act, or of any devolution by law on the death of any person dying before the Act (May 12, 1870).

By sections 3 and 4, naturalized aliens may divest themselves of their status as subjects, on certain conditions, by making a declaration of alienage in the manner prescribed by the Act, *i.e.*, before a justice of peace in the United Kingdom, or specified judges or consuls in the colonies and abroad. A like declaration may be made by any person who is a natural born subject, but who became also at his birth the subject of a foreign State by the law of that State.

The 5th section abolishes the privilege of aliens to demand a jury *de medietate linguæ*.

The 6th section provides for *expatriation*. All British subjects voluntarily naturalized in any foreign State become aliens. But a British subject previously naturalized in a foreign State may, within two years from 12th May, 1870, make a declaration of British nationality, whereby he is deemed to be, and to have been, continually a British subject. But this is subject to the qualification that such person is not deemed a British subject within the limits of the State in which he has

been naturalized, unless he has ceased to be a subject of that State in virtue of its laws or of a treaty. The declaration of British nationality is made before a justice of peace in the United Kingdom, before the specified judicial functionaries in the colonies, and before a consular or diplomatic officer of Her Majesty abroad.

Section 7 provides for the naturalization of aliens who have resided five years in the United Kingdom, or have been five years in the service of the crown, by certificate of a Secretary of State. Such a certificate confers all political and other rights of a natural born subject; but a person so naturalized is not, when within the territory of the foreign State of which he was a subject, to be deemed a British subject unless he has ceased to be a subject of that State, in virtue of its laws or of a treaty. The Secretary of State may grant a certificate for the purpose of quieting doubts as to the nationality of a British subject; and aliens naturalized previously to the passing of the Act may obtain certificates under this Act, which confers larger privileges than those granted under the now repealed Act of 7 and 8 Vict., c. 66. By the 8th section natural born British subjects, who have become aliens in virtue of this Act, may be reinvested with the character of British subjects by certificate in the same way as natural born aliens. Re-admission to the privileges of British subjects may be granted in regard to this class of persons (who are called statutory aliens) by the governor of any British colony in which the applicant has resided for the statutory period of five years.

The national status of married women and infants is provided for in section 10. A married woman is a subject of the State of which her husband is for the time being a subject. A widow who is a natural born British subject, and has become an alien in virtue of her marriage, is deemed a statutory alien, and obtains re-admission to the rights of a British subject in the manner provided with regard to that class of persons. Where the father, or the mother being a widow, becomes an alien, the children in infancy are to follow the status of the parent. So also in the case of a certificate of re-admission and a certificate of naturalization.

One of the principal Secretaries of State is authorized by section 11 to provide by regulation for the form and registration of declarations of nationality, certificates of naturalization, re-admission, and alienage; for the registration of births and deaths of British subjects born or dying abroad, and of subjects married at any of Her Majesty's embassies or legations, etc. The 12th section relates to the evidence of proceedings under the Act. Letters of denization are still competent (s. 13), and nothing in the Act qualifies an alien to be the owner of a British ship (s. 14). Nothing in the Act discharges a British subject from any liability in respect of acts done before his becoming an alien. The 18th section and relative schedules repeal in whole or in part the previous Acts relating to this subject. In particular 7 and 8 Vict., c. 66, and 10 and 11 Vict., c. 83, are entirely repealed.

CAP. 16. "THE INVERNESS AND ELGIN COUNTY BOUNDARIES ACT, 1870."

This statute is passed (June 20, 1870) for the purpose of defining the boundaries between these counties in the district of Strathspey, and of annexing the detached portions of the county of Elgin to Inverness-shire, and *vice versa*. It is only of local importance.

CAP. 19. THE RAILWAYS (POWERS AND CONSTRUCTION) ACTS, 1864, AMENDMENT ACT, 1870."

This Act improves the procedure in obtaining Board of Trade certificates under the Acts of 1864, where notice of opposition is given. The substance of the alteration introduced is that a provisional certificate may be issued by the Board of Trade. Notwithstanding a notice of opposition, a Bill to confirm this is introduced into Parliament by the Board of Trade, and the opponents, not as formerly the promoters, must now take the initiative in any further proceedings before a select committee.

CAP. 32. "THE CUSTOMS AND INLAND REVENUE ACT, 1870."

Among many alterations which this Act makes, we mention only those of general importance. The excise duties upon licensed hawkers, papermakers, soapmakers, stillmakers in Scotland and Ireland, and makers of playing-cards, are repealed (s. 3). Any one may sell fish by auction on the seashore where they have been first landed without having taken out an excise license as an auctioneer (s. 5), and makers of watch cases may sell them without being licensed as dealers in plate. Farmers may steep and germinate on their farms grain to be consumed by animals upon said farms, upon giving notice to the excise officer of the district describing the particular buildings or places where they intend to steep and germinate, and to keep the grain when steeped and germinated, and complying with all the other conditions specified in section 6. Sections 2 and 7, and relative schedules, contain the duties of customs, and excise on sugar, and granted for the use of Her Majesty, and sections 8, 9, and 10 make provisions with regard to sugar to be used in brewing.

Horses and mules kept solely for the purpose of husbandry are declared by s. 11 not to be liable to duty by reason of being employed in drawing materials for repair of roads and highways of the parish of which the owner is a rated occupier, and whether for hire or otherwise.

Part III. relates to Stamp Duties. On 1st October, 1870, the stamp duty on newspapers ceases (s. 12). A subsequent Act imposes a postage of a halfpenny. The stamp on policies of insurance imposed by 28 and 29 Vict., c. 96, ceases, and after 1st July, 1870, a stamp duty of one penny is chargeable on every policy of insurance for death from accident or violence, or otherwise than from a natural cause, or for compensation for personal injury, or for injury to property or loss of property (s. 13). The income-tax is renewed at 4d in the pound, and, for occupiers, of 2d in the pound. The poundage now paid to collectors of inhabited house duty is to be divided between the assessors and collectors in equal proportions.

CAP. 33. "THE SALMON ACTS AMENDMENT ACT, 1870,"

amends the Act of 1863 anent the exportation of salmon. That Act provided that the burden of proving that any salmon entered for exportation beyond seas between 3d September and 2d February has not been caught during close time, shall be on the person entering the same for exportation. The period to which the Act applies is extended by this statute to the 30th April; and a similar extension is given to s. 65 of the English Act of 1865 (28 and 29 Vict., c. 121). See 31 and 32 Vict., c. 123, s. 22.

CAP. 35. "THE APPORTIONMENT ACT, 1870."

This statute amends a variety of previous Acts, of which the most important—4 and 5 Will. IV., c. 22—as every lawyer now knows, applies to Scotland, but all of which, as well as this amending Act, have been drawn by English lawyers with exclusive reference to English law. The Act of 1834, however, has ruled the distribution of Scotch estates falling within its scope since the decision of *Bridges v. Fordyce*; and, looking to that decision, there is nothing in the present Act which can exclude Scotland from its operation also. It enacts (s. 2) that "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." "Rents" include, by the interpretation clause (s. 5), rent service, rent charge, and rent seek, and also tithes and "all periodical payments or renderings in lieu of, or in the nature of, rent or tithe." "Annuities" include salaries and pensions. "Dividends" include (besides dividends strictly so called) payments by way of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, whether usually made at fixed times or otherwise; and all such divisible revenue shall be deemed, for the purposes of the Act, "to have accrued by equal daily increment during and within the period for which for, or in respect of which, the payment of the same revenue shall be declared to be made;" but "dividends" do not include payments in the nature of a return or reimbursement of capital.

The alteration here made can hardly be properly described as a mere extension of the old Act. It rather reverses the rule of the common law, by which, if the estate or interest of any person entitled to any rent determined, in the interval between one of the days of payment and another, the periodical sum then accruing was entirely lost to him and his representatives. This rule was considerably modified by the Act of 1834; but that Act did not go so far as to reverse the former law. Thus, the rents of a fee-simple estate have not hitherto been apportionable, nor payments of rent due under a lease constituted otherwise than by a written instrument. Apportionment is extended by the new statute to both of these cases, and, in short,

in every case of termly payments. It takes place unless it is "expressly stipulated that no apportionment shall take place" (s. 7), to which case "the provisions of this Act shall not extend." Is it an express stipulation of this kind where the payment of interest in a moveable bond is conditioned to be at specified terms, and is not expressed to be "daily and continually?" Clearly it is not, for the law would here give the interest daily and continually, even if not so expressed, and the statute is intended to extend, and not to restrict, this effect of the common law.

By Section 3 the apportioned part of such rent, annuity, dividend, or other payment, is recoverable only when the entire portion of which it forms part is due and payable, or would have been payable if the payment had not determined. Section 4 contains provisions as to the remedies competent to persons entitled to portions of the payments falling under the Act. Section 6 declares that nothing in the Act shall render apportionable any annual sum made payable in any policies of assurance.

CAP. 37. "MAGISTRATES IN POPULOUS PLACES."

This Act is passed for the purpose of placing the senior Magistrate of populous places established under 25 and 26 Vict., c. 101, in the same position in regard to the county in which the said populous places are situated as the Provosts of Royal and Parliamentary Burghs. That is to say, such a senior Magistrate is to be, *ex officio*, a Justice of Peace and Commissioner of Supply of the county or counties in which such populous place, or any part thereof, is situated.

CAP. 42. "ABOLITION OF PETTY CUSTOMS IN SCOTLAND."

After 31st December, 1870, the Magistrates and Council of any Royal, Parliamentary, or other Burgh (as defined by the word burgh in the Police Act, 1862,) may, by resolution, abolish the petty customs or duties levied or leviable in the burgh, or part of them, and in lieu thereof impose an assessment such as will yield annually an amount equal to the net yearly amount of the said customs, or part of them, not exceeding threepence in the pound on the valuation of assessable property within the burgh. Such rate may be levied either separately or as part of the police or burgh rates. Special notice must be given by advertisement as prescribed of the meeting at which such resolution is to be proposed. Section 3 saves the rights of creditors holding securities over such petty customs, and of tacksmen thereof.

CAP. 44. "STAMP DUTY ON LEASES."

This Act is designed to remove the serious difficulties that had resulted from a decision of the Court of Exchequer (*Boulton v. Inland Revenue*, 39 L. J. Exch. 51), which subjected leases containing covenants as to building to the 35s. stamp and duty under 17 and 18 Vict., c. 83, s. 16, in addition to the *ad valorem* duty.

After reciting the decision, and that the holders of such leases had previously been generally considered to be exempt from such charge, and that it is desirable that they should continue to be so, it is enacted that, "No lease already made, or hereafter to be made, for any consideration in respect whereof it is chargeable with *ad valorem* stamp duty, and in further consideration, either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of, or addition to, the property demised to him, or of any usual covenant, shall be deemed to be, or to have been, chargeable with any other duty in regard of such further consideration."

CAP. 52. "THE EXTRADITION ACT, 1870."

This Act amends the law relating to the extradition of criminals. It enacts that when an arrangement for the surrender of criminals is made with any foreign State, an order in Council may direct this Act to apply to such State. The order may apply to a particular part of Her Majesty's dominions, and may be subject to such conditions and qualifications as may be deemed expedient (s. 2).

Certain restrictions are to be observed with respect to the surrender of a fugitive criminal. He is not to be surrendered (s. 3)—

1. If the offence in respect of which the surrender is demanded is of a political character, or if he show, to the satisfaction of the Police Magistrate or Court, or to the Secretary of State, that the requisition for his surrender has been made with a view to try or punish him for a political offence:

2. Unless provision is made by the law of that State, or by arrangement, that he shall not be detained or tried for any offence committed prior to his surrender other than the extradition crimes:

3. If accused of another offence in England, or undergoing sentence under conviction, he is not to be surrendered until after his discharge:

4. He is not to be surrendered until fifteen days after his committal.

An order in Council for applying this Act to a foreign State is not to be made, unless—(1) It provides for the determination of it by either party on notice not exceeding one year; and (2) it is in conformity with the provisions of this Act (s. 4).

When this Act applies to any foreign State, every fugitive criminal of that State is liable to be apprehended and surrendered in the manner here prescribed, whether the crime was committed before or after the date of the order in Council applying the Act, and whether there is or is not any concurrent jurisdiction in any of Her Majesty's Courts over that crime (s. 6).

Any requisition for a surrender is to be made to the Secretary of State by a diplomatic representative of the foreign State, and the Secretary of State may signify to a Police Magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the criminal (s. 7). Such warrant may be issued (1) by a Police Magistrate on receipt of such order, and on such evidence as would justify a warrant if the crime had been committed in

England; (2) by a Police Magistrate or Justice of the Peace in any part of the United Kingdom on such information or complaint, and such evidence as would justify the issue of a warrant if the crime had been committed here (s. 8). All such warrants must be reported forthwith by the person issuing them to the Secretary of State, together with the information and evidence or certified copies; and the Secretary of State may cancel the warrant, and order the discharge of the person apprehended.

When apprehended on a warrant issued without the order of a Secretary of State, the criminal is to be brought before some person having power to issue a warrant, who shall order him to be brought before a Police Magistrate. The Police Magistrate shall discharge the prisoner, unless within a reasonable time he receives from a Secretary of State an order signifying that a requisition had been made for his surrender (ib).

The Police Magistrate is to hear the case as if it was a charge of crime in England, and receive any evidence that may be tendered to show that the crime is political, or is not an extradition crime. If the evidence is such as would justify his committal according to the law of England, he is to be committed to the Middlesex House of Detention, or some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and a certificate of his committal is forthwith to be sent to the Secretary of State (s. 10).

At the end of fifteen days thereafter he may be surrendered by warrant of the Secretary of State to a person duly authorised, in the opinion of the Secretary of State, to receive the fugitive criminal (s. 11). This section requires the committing magistrate to inform the prisoner that he has a right to apply for a writ of Habeas Corpus, and that he will not be surrendered until after the expiration of fifteen days. Persons apprehended and not conveyed out of the United Kingdom in two months are to be discharged, upon an order of any Judge of one of the Supreme Courts at Westminster (s. 12). The warrant of a Police Magistrate may be executed in any part of the United Kingdom (s. 13). Depositions on oath, taken in a foreign State, and copies of the same, and foreign certificates or judicial documents stating the fact of conviction, may, by section 14, if duly authenticated, be received in evidence. The 15th section specifies the manner in which such authentication shall be made.

As for crimes committed at sea, it is enacted—(1) That the Act shall be construed as if any Stipendiary Magistrate in England or Ireland, and any Sheriff or Sheriff-Substitute in Scotland, were substituted for a Police Magistrate throughout the Act, except the part relating to the execution of the warrant of a Police Magistrate. (2) The criminal may be committed to any prison to which such person has power to commit. (3) A fugitive criminal apprehended on a warrant issued without the order of the Secretary of State shall be brought before the magistrate who issued the warrant, or who has jurisdiction where the vessel lies (s. 16).

The Act then prescribes the manner of dealing with fugitive criminals in British possessions (s. 17, 18), and then follow some general provisions.

Criminals surrendered by foreign States are not to be liable for previous crimes other than those with respect to which the surrender has been made (s. 19).

Foreign States may obtain the evidence of any witness in the United Kingdom in regard to any criminal matter pending there, in the same manner as in any civil matter, under 19 and 20 Vict., c. 113; but this is not to apply to any criminal matter of a political character. For the purposes of this Act a foreign State is to include its dependencies.

The interpretation clause is one of the most important in the Act. It incorporates Schedule I., which enumerates extradition crimes, and very greatly extends their number. These now include murder and attempt and conspiracy to commit murder, manslaughter, forgery and uttering, embezzlement and larceny (*theft* is not specified *eo nomine*), obtaining money or goods on false pretences, bankruptcy crimes, fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force; rape, abduction, child stealing, burglary and housebreaking, arson, robbery with violence, threats with intent to extort, piracy by law of nations, sinking or destroying a vessel at sea, or attempting or conspiring to do so; assaults on high seas with intent to destroy life or do grievous bodily harm, revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master. Among the other definitions, the most important is that of Police Magistrate, which means "a Chief Magistrate of the Metropolitan Police Courts, or one of the other Magistrates of the Metropolitan Police Court in Bow Street." This necessitates that all the proceedings subsequent to the issue of the warrant to apprehend take place in London, except in regard to crimes committed at sea, for which the 16th section makes special provision. A second schedule furnishes forms.

CAP. 57. "GUN LICENSE ACT, 1870."

This Act provides that, from 1st April, 1870, "every person who shall use or carry a gun in the United Kingdom" shall pay a license duty of 10s. yearly (s. 3), which shall be an excise duty and license subject to all the provisions of any Act relating to excise duties, or licenses, or penalties under Excise Acts (s. 4).

The term "gun" is to include "a firearm of any description, and an air-gun or any other kind of gun from which any shot, bullet, or other missile can be discharged" (s. 2).

The fifth and sixth sections provide for the form of licenses and the keeping of registers thereof, which may be inspected by Justices of Peace, constables, and persons licensed under the Act. The seventh section imposes a penalty of £10 on persons who shall use or carry a

gun elsewhere than in a dwelling-house or the curtilage thereof without a license, with the following exceptions:—

1. Persons in the naval, military, or volunteer service, or in the constabulary or police forces in the performance of duty, or engaged in target practice.

2. A person having a license to kill game.

3. A person carrying a gun for a person licensed to kill game, or having a gun license, by his order and for his use, if the person carrying the gun shall, upon the request of any officer of revenue, constable, or the owner or occupier of the land, give his true name and address and that of his employer.

4. Occupiers of land using or carrying a gun for the purpose only of scaring birds and killing vermin on such land, or persons so doing by order of the occupier licensed to kill game, or licensed under this Act.

5. Any gunsmith or his servant carrying a gun in the ordinary course of his trade, or using it for testing in a place set apart for the purpose.

6. Any person carrying a gun in the ordinary course of his trade as a common carrier.

In an information for not having a license, it is to be sufficient to allege the offence, and it lies upon the defendant to prove that he falls under any of these exemptions.

Where a gun is carried in parts by two or more persons, each is deemed to carry the gun (s. 8).

By the ninth section, any officer of inland revenue or constable may require any person carrying a gun (except persons in Her Majesty's service as aforesaid, using or carrying a gun in the performance of their duty) to produce his game or gun license. If not produced, the officer may demand his Christian name, surname, and place of residence, and if refused, he will be liable to a penalty of £10, and the officer may take such person into custody, and convey him to a justice, who, upon proof, may impose that penalty, or not less than one-fourth of it, and if not paid, he may be committed to hard labour for not more than a month, nor less than seven days.

Any such officer who may see any person using or carrying a gun may enter and remain on any land or premises (other than a dwelling-house) for the purpose of making such demand as aforesaid (s. 10).

The license is to be void if the person commits any offence against the Act 2 and 3 Wm. IV., c. 68 (Day Trespass Act).

CAP. 58. "THE FORGERY ACT, 1870."

This Act is to be read as one Act with the 24th and 25th Vict., c. 98 (Criminal Law Consolidation Act as to Forgery), but shall extend to the United Kingdom (s. 2), and the 2nd and 4th sections of that Act, and all provisions relative thereto in that Act, and all enactments amending these provisions, or any of them, are extended to Scotland (s. 7), the words "high crime and offence" being substituted

in the application of the various enactments to Scotland for the term "felony."

To forge, alter, offer, utter, dispose of, or put off, knowing the same to be forged or altered, any stock, certificate, or coupon issued in pursuance of the National Debt Act, 1870, or other Act, or to demand or endeavour to obtain any share or interest in stock as defined in that Act, or any dividend payable in respect thereof, by virtue of such forged document, is declared to be a high crime and offence, punishable by penal servitude for not less than five years, or imprisonment for not more than two years.

Personation of owners of stock is declared to be felony (s. 4). So also is the engraving plates, etc., for stock certificates (s. 5).

CAP. 97. "THE STAMP ACT, 1870."

As it is impossible to describe all the alterations of this Act, which repeals wholly, or in substance, 190 Acts of Parliament, or clauses of Acts, we take from the *Shipping Gazette* a *resumé* of the more important changes which it introduces: The first nine sections merely re-enact old laws. The 10th section recites that all the facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is chargeable, are to be fully set forth under a penalty of £10. This extends the law to all instruments chargeable with *ad valorem* duty, which, by 48 Geo. III., c. 149, s. 27, applies only to conveyances on sale. By clause 11, where any instrument is chargeable with *ad valorem* duty in respect of any money in foreign or colonial currency, the duty is to be regulated by the rate of exchange on the day on which the same was executed. The law in force, therefore, relating to settlements, in 28 Vict., c. 18, s. 13, will be applied to all other documents. Stock and marketable securities are to be valued according to the average price on the day of the date of the instrument. Section 13 is quite original, for it enacts that, where an instrument recites the current rate of change, it is to be stamped in accordance with such statement, and held to be legally stamped "unless or until it is shown that such statement is untrue, and that the instrument is, in fact, insufficiently stamped." The object aimed at is to induce parties to insert the rate or price upon which the duty depends, such sums to be taken *prima facie* as true until rebutted by evidence to the contrary. If an instrument is insufficiently stamped, and is produced in Court in any civil proceedings, the officer whose duty it is to read the same is to call the Judge's attention to the omission—

And, if the instrument is one which may be legally stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of £1, be received in evidence, saving all just exceptions on other grounds.

The Commissioners of Inland Revenue are to be empowered, on the production of a receipt from the Court, to denote the duty and penalty on the instrument. Except where otherwise provided by special enact-

ment, any unstamped or insufficiently stamped instrument may be stamped after execution on payment of the unpaid duty and a penalty of £10. If, however, an instrument has been executed out of the United Kingdom, it may be stamped within two months after it has been first received here, without penalty; and the Commissioners may remit the penalties at any time within twelve months on sufficient grounds to justify the exemption. Under the existing law, the penalty on the stamping of agreements, where the subject-matter is under £20 in value, is £1. The new Act, therefore, inflicts the higher penalty of £10 on all instruments, regardless of their representative value. Instruments executed in the United Kingdom, except in criminal proceedings, are "not to be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity," unless stamped according to the provisions of the Act. By section 24, any instrument the duty upon which is required to be denoted by an adhesive stamp, is not to be deemed duly stamped unless the person required by law cancels such stamp, or "it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time." This is a general rule, in substitution for several existing enactments which are to be found in—

16 and 17 Vict., c. 59, s. 4	...	...	...	Receipts and Drafts.
16 and 17 Vict., c. 63, s. 11	...	...	...	Life Policies.
17 and 18 Vict., c. 83, s. 5	...	...	...	Foreign Bills.
23 Vict., c. 15, ss. 9, 11	...	...	...	{ Certified Copies, Delivery Orders, Dock Warrants, Cost Book Mines.
23 and 24 Vict., c. 111, ss. 5, 7, 9, 12	...	...	...	{ Foreign Promissory Notes, Policies, and Agree- ments.
24 and 25 Vict., c. 21, s. 14	...	...	...	Furnished Houses.
24 and 25 Vict., c. 91, ss. 27, 33	...	...	...	Proxies.
27 Vict., c. 18, s. 14	...	...	...	Voting Papers.
28 and 29 Vict., c. 96, s. 7	...	...	...	Charter-parties.

"The due cancellation of adhesive stamps is not at present essential to the admissibility of an instrument, except in cases of agreements liable to the duty of 6d., and for the letting of furnished houses. Among the sixpenny duties are those on charter-parties, the law of which as it at present stands requires the person last signing to cancel the stamp by writing thereon his name, or that of his firm, together with the date. Some persons unacquainted with the enactment simply write their initials, which makes the document valueless in point of law. After the 1st January next, the law will be less exacting, and more liberal in one respect, for if by oversight at the moment the stamp be not cancelled, proof of its having been placed on the instrument at the time of its execution will render its context binding. In this new Act a charter-party is defined to be—

"Any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of such ship or vessel.

"If the duty on a charter-party is not denoted by a stamp, it must be stamped by an impressed stamp within seven days after the first execution, on payment of the duty and a penalty of 4s. 6d.; and after the expiration of seven days, but within one month, on payment of a penalty of £10, and cannot in any other case be stamped. If the charter has been executed out of the United Kingdom, either party thereto may, within ten days after its receipt, and before it has been executed by any person in the United Kingdom, affix an adhesive sixpenny stamp; and if such stamp is cancelled properly, the instrument is to be deemed duly stamped. Two years ago, a question arose in a cause heard before Chief Justice Bovill respecting the validity of the copy of a charter-party. Any number of copies of a charter-party, as we then explained, may be made; but if they are signed by the original parties to the conditions, they must be stamped, in accordance with the law, in a given time, or they cannot be produced as evidence in Court. Copies of charter-parties attested, or in any manner authenticated, and not bearing the signature of the contractors, may be stamped at any time within fourteen days of attestation, and presented as evidence, if the original was duly stamped. Thus, for example, if a charter-party is entered into and completed, copies of the same may be made out by a clerk, compared and witnessed by a second person, and sent to be stamped on payment of the sixpenny duty only per copy, within fourteen days. An attested copy of any stamped instrument being admissible in Court, it is advisable, where large transactions have been entered into, for each party to a charter to possess a copy of the agreement. Masters, however, very frequently, or we should say too commonly, sign a charter-party, and are then furnished with a copy which has neither been certified as attested nor stamped. These last-mentioned copies of the terms of a charter are good enough in their way, if no dispute should arise; but in the event of litigation, the want of a duly stamped agreement is soon felt to be a source of difficulty and expense." Other clauses are reserved for another article.

PROOF OF NEGLIGENCE—RES IPSA LOQUITUR.

NEGLIGENCE, as a general rule, is a question for a jury, and verdicts upon the simple question of negligence fairly presented will generally be conclusive. Questions may arise, as in any jury case, as to the sufficiency of the evidence; and although some greater control appears to be exercised by English Judges over juries than we are accustomed to observe in this country, both in respect of guiding their deliberations, and of withdrawing cases from their consideration where no evidence is adduced bearing on the point at issue, it cannot be said that on the general point a material difference exists between the practice on this side of the Tweed and the other. There is, however, a class of cases where difficulties have

arisen in England, as to what is called the burden of proof, although, according to our notions, the burden of proving his case would seem always to rest on the plaintiff. The mere happening of an accident is not in general *prima facie* evidence of negligence, such as to shift the *onus* upon the defendant. The pursuer must, as a rule, give some positive proof of the defender's negligence, although it is certain that cases may be imagined, and frequently occur, in which the circumstances of the accident themselves afford a pregnant presumption of the defender's culpability. Such are cases where an obvious duty of precaution lay upon the latter. Still it seems a subtlety, rather than a distinction of much practical value, to say that in such cases the mere state of facts is indicative of negligence, and reverses the *onus*; for the pursuer, in proving the state of facts, proves at the same time the fault of the defender. As in criminal matters, it is impossible always to draw a line between proof of the *corpus delicti* and that of the prisoner's guilt, so the evidence that an accident occurred and the evidence that it was due to the fault of the defender generally run into one another. In England, however, such a distinction is made, and a maxim has come into vogue, which is scarcely known in our courts. Where an accident is of such a character that negligence may be assumed from the unexplained fact that it happened, Judges have been in use to advise or direct juries to infer such negligence, and the phrase, "*Res ipsa loquitur*" is applied to such a state of the facts.

Early instances of the application of some such principle occurred in some actions against railway companies. In *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 787, the accident occurred through an excursion train running against a train of the same company standing still at an intermediate station, and it was held that the mere fact of the accident occurring was *prima facie* evidence of negligence. So in *Carpue v. London and Brighton Railway Co.*, 5 Q.B. 757, 13 L.J. Q.B. 133, the proposition seems to be assumed that where an accident occurs to a railway train, by which the plaintiff is injured, the *onus* lies on the company to show that it was not occasioned by their negligence or misconduct. The rule is somewhat limited in its terms in *Bird v. Great Northern Railway Co.*, 28 L.J. Exch. 3, and other cases; and the true doctrine is, perhaps, most correctly stated by Mr Justice Willes in giving the judgment of the Court in *Daniel v. Metropolitan Railway Co.*, 37 L. J. C. P. 146, L. R. 3 C. P. 591, where he says, "It is not sufficient to show that an accident happened on the defendants' railway, but the plaintiff must establish a case from which it may fairly be inferred that the accident happened from want of some precaution to which the defendants ought to have resorted; and I feel disposed to go further, and say that the plaintiff ought to define with reasonable certainty what that precaution was which ought to have been taken. I do not think it necessary in this case to draw any distinction between the case of a railway company and that of any other carrier, beyond

this, that as a railway company travel in a given line, if they were aware of any danger likely to be met with in the course of the journey which it was in their power to have averted by the adoption of some reasonable precaution, their not adopting that precaution would be a violation of their duty to use reasonable care in the carriage of their passengers."

In short, there must in all cases be some evidence of negligence on which the jury may reasonably act, although the particular point at which the *onus* is shifted upon the defendant is often very difficult to determine. It is here that there is a suspicion that English Judges have gone rather too far in extending the application of the maxim *res ipsa loquitur*, or, to speak more correctly, in giving that phrase a dangerous currency and authority. The following are cases in which effect has been given to it. Where a man was hurt by a barrel of flour falling on him out of a warehouse window, while he was walking in the street below, the Court held that it was unnecessary for him, in suing the warehouseman for negligence, to prove what actually occasioned the fall of the barrel; *Byrne v. Boadle*, 2 H. & C., 722. In *Scott v. London Dock Co.*, 34 L.J. Ex. 17, 220, 3 H. & C., 596, a custom-house officer was injured, while in defendant's premises in the performance of his duty, by goods falling on him from a crane fixed over a doorway under which he was passing. No explanation was given why the goods fell, and majorities of the Court of first instance and of the Court of Exchequer Chamber were of opinion that the *onus* of disproving negligence was on the defendants, and that in the absence of any reasonable explanation the accident itself, which was not such as happened in the ordinary course of things, afforded reasonable evidence of negligence. In *Briggs v. Oliver*, 35 L.J. Ex. 163, the plaintiff had his foot injured by the fall of a packing case which belonged to the defendant, and was leaning against the wall of the defendant's house. There was no evidence who placed the packing case there, or what caused its fall. It was held that the fall of the packing case was in itself evidence of negligence to go to the jury. It was held that the defendant was responsible for this packing case; and "therefore," says Bramwell, B., "if it was in an unsafe position, and did anybody damage, he was responsible. Then, was there any evidence that it was in an unsafe position? To my mind there was, and, as has been said, *res ipsa loquitur*. Packing cases do not fall naturally and of their own accord when they are carefully placed in a proper position; and we have no right to assume that something was done to this packing case by somebody else not the defendant's servant so as to cause its fall. Therefore, there was a *prima facie* case of negligence, just as in the other cases cited in which it was said that casks of flour do not roll out of windows naturally, and therefore that if one is being handed out and fall, it is owing to the negligence of the persons handing it out; and in the other that if a bag of sugar is being let down in a sling and it falls out, it is *prima facie* owing to its having been put in the sling in a negligent manner." The latest case is *Kearney v. London*,

Brighton, and South Coast Railway Company, 39 L.J., 200. There the plaintiff was passing along a highway, under a railway arch of the defendants, and a brick falling from the top of one of the pilasters, struck the plaintiff, and caused him injury. A train had passed just previously. It was held by Cockburn, C. J., and Lush, J. (Hannen J., dissenting), that defendants being bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence in the defendants. The Lord Chief Justice stated in his judgment that this was one of the cases in which the maxim *res ipsa loquitur* would apply. But he admits that very little evidence would have rebutted the presumption that there had not been careful inspection of the bridge.

In both the cases last cited there was a dissentient Judge. In *Briggs v. Oliver*, Baron Martin thought that the so-called evidence of negligence was "all surmise and imagination. The fallacy," in his view, "that lies at the bottom of all these cases is, that the plaintiff is excused from proving negligence, because the person who knows whether there was in fact negligence or not is the defendants' servant. The plaintiff might have called him, and it is not to be affirmed that he would have told an untruth about it. But he was not called, and it was said that it was for the defendant to disprove negligence. I think that that is bad reasoning and bad law." And he expresses his approbation of the law laid down by Mr Justice Williams in *Cotton v. Wood*, 8 C. B. N. S. 568, 29 L. J. C. P. 333, and repeatedly cited in such cases—viz., that where the evidence is equally consistent with either view—the existence or non-existence of negligence—the Judge ought not to leave the case to the jury. In *Kearney's case*, Mr Justice Hannen took a similar view to that of Baron Martin, holding that the defendants were not bound to explain the falling of the brick till some case had been made by the plaintiff.

Upon the whole matter it seems that the English Courts, in deciding what is evidence to go to a jury, have erred on the cautious side. They have refused to encroach on the province of the jury where they could avoid it. But if they are to be understood as pointing out on what presumption a jury ought to act, then we cannot but think that they are going too far, and that no Scotch judge would charge a jury to give a verdict, or would himself pronounce a finding, such as that which was supported in *Kearney's case*. Circumstances may occur where the accident itself could not happen but by negligence of the defender; but in a question of fact for a jury the phrase *res ipsa loquitur* only serves to define the kind of evidence upon which negligence is found. It seems, too, erroneous to say that it dispenses with such evidence, or even that it indicates a state of facts where such negligence is presumed. Presumptions are very dangerous weapons to use in jury cases—indeed, they are altogether alien to the atmosphere of a jury Court, having been invented by Judges who had

to try questions of fact as well as of law, and who were hampered by a system of extravagant restriction on the admissibility of evidence, in order to save themselves trouble and supply the want of evidence excluded by technical rules or otherwise.

We cannot help thinking that the safer rule is that which has been followed in another set of cases—that some positive proof of the defendant's negligence must be produced. Thus, where it appeared that a ladder inside a private house had, from some unexplained cause, fallen against an upper window and broken it, and the glass in falling had damaged the eye of a person who was passing by the house at the time, it was held that the proof of these facts alone was insufficient to fix negligence on the owner of the house; *Higgs v. Maynard*, 1 H. and R. 581. So in *M'Carthy v. Young*, 6 H. and N. 329, the defendant having erected a scaffold in order to pull down a house, employed a carpenter to do a portion of the work, and for that purpose allowed him the use of the scaffold, which, owing to some defect, of which no scienter was alleged, fell, and the plaintiff, one of the carpenter's workmen, was much injured, it was held that he had no remedy against Young.

The case of *Farrant v. Barnes*, 11 C.B., N.S., 553, is also worth consideration. There the defendant sent a carboy of nitric acid to a railway carrier to be taken into the country, which, after passing through various hands, exploded, and injured the plaintiff, who was carrying it. It was held that the defendant was responsible, proof having been given that the defendant had not taken reasonable care to make the carriers' servants aware of the dangerous nature of the acid.

Review.

Commentaries on the Law of Scotland, and on the Principles of Mercantile Jurisprudence. By GEORGE JOSEPH BELL, Esq., Advocate, Professor of the Law of Scotland in the University of Edinburgh. Seventh Edition. Being a Re-publication of the Fifth Edition, with Additional Notes adapting the work to the present state of the law, and comprising Abstracts of the more recent English Authorities illustrative of the Law of Scotland. By JOHN M'LAREN, Esq., Advocate, Sheriff of Chancery. Vol. I.—Division II. Edinburgh: T. & T. Clark.

How Mr M'Laren finds time to prepare and put through the press in rapid succession works of such size and importance as those with which his name is now associated, is one of the things which few people can understand. In August we reviewed the first half of the volume now before us, and we had no expectation that it would be completed within the present year; yet here it is, at the middle of September! Mr M'Laren is known not to be a mere book-maker, but to be largely, not too largely, engaged in the active work of the bar. Perhaps the one good thing that the world really owes to that

monopoly which is now destroying the efficiency of the bar is, that such a lawyer as he is has still some *horæ subsecivæ* to devote to the advancement of jurisprudence. The favours of the three or four firms which make Judges, Sheriffs, and Advocates-Depute, are seldom conferred on men who are capable of this thankless but difficult and invaluable labour.

The Second Part, which completes the first volume, contains the editor's preface, in which he makes an almost superfluous apology for re-publishing Mr Bell's text instead of an edition "entirely recast according to the method of which Mr Sergeant Stephen's *Blackstone* is a successful example." He states that in revising the second volume he has omitted the author's chapter on the repealed Bankruptcy Acts of King George III., and has substituted for it Mr Shaw's chapter on the Bankruptcy Acts of the present reign, which embraces Professor Bell's observations so far as applicable to the present state of the law. He notices important contributions on the subjects of sale, guarantee, and agency, by Mr J. A. Dixon of Glasgow. We observe very extensive notes on these subjects, containing numerous references to English authorities, and raising many important and interesting questions. Mr Dixon is well-known as an able and well-read lawyer, and though Mr M'Laren himself vouches for the accuracy and value of his contributions, his name is sufficient to secure for them respectful attention and consideration. When we come to review the book as a whole, we shall probably deal with some of the questions raised in these notes, and we shall endeavour to satisfy ourselves whether they do not betray too great a propensity to adopt English law as identical with our own. We do not say that there is such a propensity, but that some passages have raised a suspicion of it, into the correctness of which we shall hereafter inquire.

The Month.

Indorsation of Dock Warrants.—In the United Kingdom, and, we believe, in all maritime States, Bills of Exchange and Bills of Lading are transferable by indorsation, the right to the money or the property, of which the several instruments we have mentioned are the titles, passing to the indorsee and holder without intimation to the debtor or granter. In England, too, this method of transferring the right to money and property having been found to afford so great facility to persons engaged in mercantile pursuits, was many years ago extended by custom of trade—such custom having been recognised and approved by the Courts of law—to the warrants or certificates for goods deposited in the warehouses of the London Dock Companies, and of private wharfingers; and, we believe, nothing has so much contributed to make London the great depot for all kinds of merchandise, as the transferability by indorsation of the London Dock Warrants. Under

the London system, the holder of a dock warrant for, say, ten thousand pounds worth of tea, can go to his banker, and without requiring to ask a friend to join him in a bill, but by simply indorsing the dock warrant and leaving it with his banker, can get an advance of from £7000 to £8000. In the same way, a sugar merchant who, it may happen, has had a cargo delivered to him at a time when the market is flat, finds the London system most convenient. The cost of the goods may be £20,000, and the bills drawn for them may be falling due. Intending to hold till the market improves, the London merchant takes the dock warrant to his banker, and gets an advance of £15,000, with which and part of his own capital he takes up the foreign draft for the price. By the indorsation of the warrant, the banker's title is complete; the indorsed warrant requiring no intimation to the warehouse-keeper. When the state of the market suits, the merchant sells his cargo, repays the advances, and gets back his dock warrant.

In Scotland it is very different. If a merchant here gets an advance from his banker or broker, he must grant an order for delivery of the goods upon the warehouse-keeper in favour of the lender, and the property does not pass till this order has been intimated to the warehouseman. By this intimation, the transaction becomes known to third parties, and there is the risk of its being communicated to persons who have no right to know anything of the matter. And see how this necessity for intimation affects merchants residing out of Scotland, say in London. A trader there may wish to purchase goods warehoused in one or other of the warehousing ports of Glasgow, Aberdeen, Dundee, Greenock, and Leith; but he finds that though he pays the price in London, and gets his order of delivery, the goods are not his until he has sent the order down to Scotland, and had it intimated to the warehouse-keeper. Naturally enough, he will ask why it is that in regard to goods in London, the moment he pays his money and gets the indorsed warrant, the goods are his, but in Scotland, between the commercial towns of which and London there are now daily so many large transactions, the goods are not his till something further is done? He will also ask why it is that in Scotland a cargo, while on board ship lying in the harbour, can be completely transferred by simply indorsing the Bill of Lading granted by the master, the then custodier; but the moment it leaves the ship and is put into a warehouse on shore, it cannot be transferred by simply indorsing the warehouse-keeper's certificate? We know of no satisfactory answer to these questions, and cannot understand how the difference in the laws of the two countries should have so long been permitted to continue. That the London system affords great advantages is evident from the fact that, so far back as 1848, the Mersey Dock Board applied for and obtained an Act of Parliament declaring that the warrants issued by the keepers of their dock warehouses should, as in London, be transferable by indorsation; and Hull and other seaports in England have obtained similar Acts. So lately, too, as 1869, the Dublin Dock

Board, when before Parliament for a new Dock or Harbour Act, sought and obtained powers to issue warrants for goods deposited in the Dublin warehouses, such warrants to be transferable by indorsation. The following are the clauses in the Hull Dock Act bearing on the question:—

“The (Dock) Company, from time to time, at the request of any person warehousing or depositing any goods in any warehouse or upon or in any of the quays or yards of the company specially appropriated for the purpose, or entitled to any goods so warehoused or deposited may, if the company think fit, issue and deliver to him a certificate, in a form approved by the company, of the goods so warehoused or deposited or any part thereof to be respectively specified in the warrant.”

“The goods specified in any such certificate of the warehousing or depositing thereof shall, for all purposes of this Act, be deemed the property of the person in that behalf named in the certificate.”

“Every such warrant for delivery shall be transferable by special indorsement, and shall entitle the person named therein or the last indorsee thereof named in the indorsement, and the goods so specified shall for all purposes be deemed his property.”

Now what has been found so beneficial in the warehousing ports in England and Ireland, and what has been sanctioned not only by the custom of merchants and the English Courts of law, but by special legislation, cannot but be beneficial to Scotland. There seems to be no good reason why dock or warehouse warrants issued at the warehousing ports here should not be made transferable by indorsation as in England, and possess the same privilege as in the other end of the island.

The Married Women's Property Act.—This is one of the few pieces of important legislation which have been achieved in the late Session; and the greatness of the innovation on the English law, and still more the magnitude of the changes which its promoters at first suggested, require from us some notice of its provisions, although their effect does not extend to Scotland. The law peers have not conceded to Mr Russell Gurney and the supporters of female rights their original revolutionary principle that a married woman should be absolutely independent in regard of possessing and transferring property and of acquiring and incurring all legal rights of action; but the Act which has passed certainly goes far to remove a serious wrong. Not only are the earnings of a married woman, obtained in any trade or occupation, carried on separately from her husband, constituted by this Act her sole property, but money or other things acquired by the exercise of any literary, artistic, or scientific ability are similarly protected. And these earnings, when accumulated and deposited in savings' banks or invested in Post Office Annuities, naturally remain subject to the same rule. Furthermore, stock standing in the books of the Bank of England in a married woman's name, or paid-up shares in a joint-stock company, or shares in a friendly society registered in her name, are reserved to her separate use. She is allowed also to receive any personal property

that may come to her as the next of kin to an intestate, and to enjoy the rents and profits of any realty to which she may have a claim as the heiress of an intestate, and to these she becomes entitled in her own right. Singularly enough, a distinction for which no rational ground can be assigned has been drawn between the property devolving upon her as heiress or next of kin, and that devised to her by will or granted by deed. The latter, beyond a trifling amount, is allowed to go to the husband as under the present law. The new law enables a wife to effect insurance on her own or husband's life for her separate use, or take a right to such an insurance effected by her husband for her benefit, subject to deduction of the premiums paid if the husband's other estate should be insufficient to pay his debts. A married woman may sue for separate property under this Act and in some other cases, and may be sued for her debts contracted before marriage for which the husband is not henceforth liable, and for which her separate property is made liable. She is also liable to the parish for the maintenance of her husband and children.

Perils of the Sea.—The case of *The Merchants' Trading Company (Limited) v. The Universal Marine Insurance Company (Limited)*, which has just been tried at Liverpool, has attracted a good deal of attention from the circumstances of the loss, the comments to which it gave rise, and an action of libel which resulted; but the point on which it finally turned was a very narrow one. The action was to recover £2000, the amount insured by a policy of the defendants upon the ship the *Golden Fleece*, on a risk at and from the Mersey to Cardiff. In the evidence a great deal was said about the history of the ship, the prices at which it had changed hands, and the repairs executed at various dates: but the material facts of the case appeared to be that the ship when it sailed from Liverpool had been properly surveyed, and was believed to be sound, but on the return voyage from Cardiff she foundered off Barry Island, to which, as usual, she had been taken in the afternoon to await a favourable tide for sailing. On leaving Cardiff her cargo had been properly stowed, she drew 24 ft. of water, but was believed not to be overloaded, and her ports, which were closed and water-tight, were several inches—a sufficient distance—above the water line. Still the ship foundered as stated, when she had hardly left port; the captain, when he observed her making water, not having time to run her ashore. In these circumstances Mr Justice Lush directed a verdict for the defendants, explaining to the jury that a contract of insurance is one against the perils of the sea, subject to the implied condition that the ship must start sea-worthy. The insurance was only against losses which may, not against those which must, occur. In some cases, as where a ship was lost in a gale, the burden of proving unseaworthiness was thrown upon the underwriter, as there was an apparent external cause for the injury; but the circumstances of the case were different. The plaintiffs had themselves contributed a large body of external evidence to show conclusively that the cause of the loss was not external. It "was not due to knocking against the dock in coming out, rolling, or weather, for the plaintiffs had by their evidence, and especially by the captain's, disproved the existence of any such agencies. They had also disproved the possibility of the water coming in through the coal ports, for they had shown conclusively that they were securely closed. The inference was, therefore, that as it had not come through the only artificial inlet the ship afforded, it must have come through some part of her compact fabric, which was supposed to be strong, but was in reality weak. It thus became unnecessary to consider the evidence upon the questions of the ship's condition, her fitness to carry the cargo, or her draft of water, as to which there was much equally positive, produced on either side, for by the plaintiffs' proofs the case became one where

theory was displaced by fact. According to the description given by the plaintiffs themselves, the ship was unable to keep herself afloat in still water, and there was no peril of the sea at all." The jury accordingly returned a verdict for the defendants.—*Economist*.

Copyright in Trade-Marks.—A point of some importance to manufacturers was argued lately at Manchester, before Mr Justice Lush. An action was brought by the representatives of a Mr Hardcastle, a "bleacher, dyer, and finisher of grey cloths," against another manufacturer in the same business, for the piracy of the former's trade-mark, usually affixed to the "Jeannettes" finished by his firm. The trade-mark consisted of Mr Hardcastle's coat-of-arms, crest, and initials, surrounded with a scroll and border in blue and gold, on a white ground, and it was proved to have been favourably known in the trade. The defendant's trade-mark consisted also of a coat-of-arms, crest, and initials, not, however, the same as those of Mr Hardcastle, but similarly displayed with the white, blue, and gold colours. It was argued for the plaintiff that drapers, not being commonly skilled in heraldry, would be more likely to be guided by the colours than by the blazonings, and would buy the defendant's goods, attracted by the repute of the plaintiff's trade-mark. Mr Justice Lush told the jury that to bring home the charge of piracy in such a case two things must be proved—first that the trade-mark was copied, and, next, that this was done with intent to divert custom from the manufacturer of the goods originally bearing the marks initiated; the owner of a trade-mark had not an absolute monopoly of its use which he could enforce irrespective of the motive of the infringement, as the owner of a patent or registered design could do, but was rather in the position of an author whose copyright protected him, not against a similar book, but only against an obvious copy. We apprehend that a colourable imitation comes under the law laid down by Mr Justice Lush, and the jury in the case referred to evidently took this view, for though there was no absolute copy, but only an imitative use by the defendant of the colours and outlines characterising the plaintiff's trade-mark, they gave an unhesitating verdict for the latter. The intention, in fact, is the most important point to be proved, and this must be a matter of inference from the circumstances of each individual case.—*Economist*.

Partnership in Joint Stock Companies.—Lord Justice James—*re* the Agricultural Cattle Insurance Company, Baird's case—has decided an important point as to the effect of death upon the liability of the estate of a member of the Association. Is death to be considered as terminating a partnership so far as the individual member is concerned, so that the estate is not liable for debts subsequently incurred? The Lord Justice has decided that the estate is liable till the shares are sold or put in the name of some other person. The present case arose out of very old facts, Sir David Baird having died so long ago as 1852, and the debts for which liability is now enforced against the estate having subsequently arisen. The deed of settlement of the Insurance Company had, moreover, provided that no executor should hold shares or receive any dividend which might be declared thereon, but that the dividend should be held in suspense till the shares were transferred. Upon these facts the Master of the Rolls had ordered an inquiry as to what debts were incurred before Sir David Baird's death, and it is upon an appeal from this order that Lord Justice James has decided that there is a liability for debts subsequently incurred. A Joint Stock Company, he said, is not a partnership, terminable by the death of each member, otherwise an account would have to be taken at every member's death, but it is a continuous association, where the members agreed that the holders of the shares for the time being should share the profits and bear the losses of the concern. The Deed of Settlement did not alter the general effect of the law. On every principle of equity, as well as on the construction of the deed, it was impossible to draw any distinction between the case of a living shareholder and the representative of a deceased shareholder. His Lordship added that "he had taken some time to consider his judgment, because he had been formerly the draughtsman of several deeds similar to the present one, and knew very well what his intention in drawing them was,

and, therefore, thought he might have been misled as to the true construction. But he was satisfied there was no doubt about it. The result was that Lady Anne Baird was liable as a contributory without any limitation, but of course, only in her representative character."

Obituary.—ALEXANDER COLQUHOUN-STIRLING-MURRAY-DUNLOP, Esq., of Corsock, Kirkcudbrightshire, Advocate (1820), and some time M.P. for Greenock, died on 1st Sept., at the age of 72. He was the eldest son of the late Mr Alexander Dunlop, of Keppoch, Dumbartonshire, a banker in Greenock, by his second wife Margaret, daughter of William Colquhoun, Esq., of Kenmure, Lanarkshire. He was born at Greenock, in 1798, and having received his early education at the Grammar School of his native town, subsequently entered at the University of Edinburgh. He was called to the Scottish Bar in 1820, was for several years assessor to the town of Greenock, and was the author of works on Parochial Law and on the Poor Law, which earned for him no mean reputation, and he was associated with Mr Patrick Shaw from 1823 till 1835, and with other gentlemen till 1840, in the compilation of the standard series of Reports of the Decisions of the Court of Session, which bear the venerable names of Shaw and Dunlop. From an early age, Mr Murray-Dunlop sided with the Whigs in politics, and took a prominent share in the electioneering contests for Dumbartonshire, in which county he happened to be a freeholder. He was for some time chairman of the Liberal Committee, and an adherent of the late Sir James Colquhoun; but a misunderstanding having arisen as to the candidate to be brought forward, a hostile meeting took place between Mr Dunlop and Sir James's eldest son, the combatants, however, being fortunately separated without bloodshed. In the ecclesiastical agitation, which resulted in the secession of 1843, Mr Dunlop's professional knowledge stood him in good stead. He was one of the leaders of the party which eventually formed the Free Church of Scotland, and was the framer of the "Claim of Rights" for that Church, and of the "Protest" made on the occasion of the Disruption. When the Free Church was organised, Mr Dunlop was appointed legal adviser to the body, an office which he held down to the time of his death. In 1845 he was brought forward as a candidate for the representation of Greenock, in opposition to the late Mr Walter Bain, but was defeated by a very small majority. At the general election in 1847 he again entered the field against Lord Melgund, now Earl of Minto, who, however, headed the poll by 141 votes. In 1852, Lord Melgund having declined to contest the seat, Mr Dunlop stood in opposition to Sir James Elphinston, the "Protectionist" candidate, and was returned by an overwhelming majority. He continued to represent his native town till the summer of 1868, when, feeling that his health would not withstand the turmoil which he predicted in connection with the carrying out of reform, he placed his resignation in the hands of his constituents. Mr Dunlop never shone as an orator, and since his retirement from Parliament he has resided for the most part at his seat at Corsock, his chief employment of a public nature being the occasional

rendering of service as arbiter in poor law cases. He received the honorary degree of LL.D. from Princeton University, United States of America, some years ago. Mr Dunlop assumed the additional surname of Murray, on his wife's succeeding to the estates of her father, who died in 1849. Mr Dunlop, having recently succeeded to the entailed estates of Law and Edinbarnet, in Dumbartonshire, added to his other surnames those of Colquhoun-Stirling. The deceased gentleman married in 1844 Elizabeth Esther, only child of John Murray, Esq., an East Indian merchant, of Edinburgh, by whom he has left issue, four sons and three daughters.

Correspondence.

EDUCATION OF LAW AGENTS.

GLASGOW, 19th Sept., 1870.

SIR,—Referring to your Correspondent's letter in last number, applying to a previous article on this matter, permit me to make a remark or two.

There is no doubt that the system inaugurated by the Procurators' Act of 1865 was much called for, and is in most respects a very beneficial one.

As to the administration of the Act, at least in regard to the manner in which the General Council Examinations are conducted, however, a good deal of discontent seems to exist. These examinations are pretty stiff, but that, though perhaps falling heavy on the candidates at present coming forward, who have not undergone the periodical examinations prescribed for the apprentices dating after the passing of the Act, is not what is much complained of. The cause of complaint, so far as I can learn, and to me it seems not altogether a groundless one, is the secrecy with which everything connected with the examinations is conducted. Candidates are prohibited from retaining a copy of the questions put to them, or even of their own answers, and at the close of the diet, or rather in the course of a week later, all they know is, that they have been passed, or that they have been rejected; of course this is quite sufficient for the fortunate ones, but to the unsuccessful it is far from comforting; to be kept in entire ignorance of how this result has been arrived at; on what grounds they have been rejected; on what points they are wanting in knowledge; how far they have fallen short of the required standard of proficiency, or what that standard may be, if indeed there is any such beyond the mere personal ideas of the examiners themselves, is scarcely fair, and very hard, to say the least of it.

Now this, I think, is far from satisfactory for any of the parties concerned. Rejected candidates (in the bitterness of their shame and sorrow) are not slow to insinuate that they have been unfairly dealt with, and that the examiners are simply bent upon a policy of exclusion, or, perhaps, limited admission it might be termed. Of course, it is to be presumed that these allegations are quite void of foundation. But why not avoid all this dissatisfaction and cause of complaint; it could very easily be got rid of by having a fixed standard of required efficiency, doing away with all secrecy about examination papers, and letting the whole of the candidates, successful and unsuccessful, receive back their papers, with the necessary markings or corrections thereon. If the examiners are capable men, they can surely have no reasonable objection to this, while it certainly would confer a very great benefit on the gentlemen who are deficient, in pointing out to them wherein this deficiency consists, and so enabling them the better to remedy it.

Your Correspondent remarks "that if a perusal of some of the rejected papers were obtained, one might afterwards be satisfied with the propriety of the

General Council's decision;" then, why not give that satisfaction which is precisely what is wanted, combined with a known and defined standard of the excellence that must be attained? This would at least relieve the *examiners* from the painful duty of rejecting a candidate, and be the sure and effectual means of saving them from being subjected to unfounded criticism either public or private.

On no account should the examinations be a whit less severe than at present; and with the improvements above suggested, the sieve is not a bit too fine to keep back the dross.

Perhaps you, or some of your readers, will be kind enough to answer the following question: In the case of an apprentice falling under the provisions of the Procurators' Act, who served an apprenticeship, but did not comply with the requirements of the Act, of entering into indenture and passing the necessary examinations, is there any way of remedying this neglect, or obviating its consequences? Two or three cases of country clerks in this state have come to my knowledge, the neglect arising solely from the carelessness of their masters; for how could boys at their outset be expected to be aware of the passing of such an Act, and of the necessity of these formalities?—I am, Sir, your obedient servant,

RECTUM.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT, HADDINGTON.—Sheriffs SHAND and SHIRREFF.

JAMES SKIRVING v. JOHN SKIRVING.

Right of Retention—Naulæ Caupones.—A lodging-house keeper held to have a right of retention over the goods of his lodger, in security of the charge for board and lodging.

James Skirving, a dentist, resided for some time with his father, John Skirving. James having left the house, presented a petition in the Sheriff Court praying that John Skirving should be decerned to deliver up certain professional instruments and materials. John Skirving maintained in defence, that he had a right of retention over the articles left in his house, in security of what the petitioner was due for board and lodging. The claim for board and lodging was not admitted. The Sheriff-Substitute (Shirreff) allowed the respondent a proof of his claim for board and lodging, adding the following note to the interlocutor:—

"Professor Bell lays it down (Principles, s. 1428, edit. 1839) that the retention of innkeepers and stablers extends over the *goods*, horses, and carriages of travellers for the expense of keep or of entertainment while in his stable or inn upon that journey. The same writer (ii. Comm., p. 104, 5th edit.) states this right of retention as the counterpart of the innkeeper's responsibility for the safety of the traveller's luggage under the edict *naulæ caupones*. It has been held that lodging-house keepers are responsible for the safety of luggage, *May v. Wingate*, Feb. 16, 1694 (Mor., 9236), and *Scott v. Yates*, Feb. 20, 1800 (Hume, 207). The rule settled by these decisions was not departed from in the case of *Watling v. M'Donell*, June 10, 1825 (4 S. 83).—If the keeper of a lodging-house is liable for the safety of his guest's goods as an innkeeper is, it seems only fair that the lodging-house keeper should have the same right of retention in security of his claim for entertainment."

The petitioner appealed. The Sheriff (A. B. Shand) adhered, adding the following

Note.—There appears to be no doubt that an innkeeper would be entitled to retain the effects in question, for payment of the amount due to him for maintenance and entertainment of his guest or customer. It has not been decided that a lodging-house keeper or person who agrees to supply board and lodging has a similar right, but, having regard to the authorities cited in the note to the interlocutor appealed against, the Sheriff is of opinion that such a right exists. See also Ersk. 3, 1, ss. 17 and 18.

The keeper of a lodging-house appears to have such possession of the effects of the inmate of his house as renders him responsible for their safety. Having such possession, it appears to the Sheriff that he is entitled to maintain it in order to secure performance of the contract under which the possession was obtained, and that a sound distinction cannot be drawn between his case and that of an innkeeper. This seems to be the view indicated by Professor Bell in the passage in his Commentaries referred to by the Sheriff-Substitute, and it appears to have strong equity to support it.

Agents—A. S. Notman and William Watson.

SHERIFF COURT OF LANARKSHIRE, AIRDRIE.—Sheriffs BELL and LOGIE.

RAMSAYS v. WATSON.

Reparation—Injury to Property—Landlord and Tenant.—The interlocutors in this case are as follows:—

Airdrie, 10th June, 1870.—Having heard parties' procurators on the concluded proof and whole cause, Finds that the pursuers are tenants under the defender on a ten years' lease from Whitsunday, 1868, of shops and premises in Bank Street and Hallcraig Street, Airdrie, at a yearly rent of £48 sterling: Finds that the whole tenement of which pursuers' premises form a part, is the property of the defender, and that the two flats above pursuers' shop and below the garret, which had previously been tenanted by Mrs or Main, have been unoccupied since Whitsunday, 1869: Finds that there were two cisterns in the garret, each capable of holding 100 gallons of water or upwards, the one cistern being supplied with water from the Airdrie and Coatbridge Water Company's main pipe, and the other cistern being supplied with rain water from the roof: Finds that from the bottom of the first of these cisterns, a pipe was taken down into the bath-room of the flat below, being the upper flat of the two formerly occupied by Mrs Main: Finds that said pipe, after leaving the bath-room, went along the floor and down the back of the window shutter into the jaw-box of the kitchen in the flat below: Finds that there is a crane or stop-cock in the bath-room for shutting off the supply of water from this jaw-box: Finds that on the night of 29th or morning of 30th December, in consequence of a severe frost which had caused the pipe to burst above the jaw-box, the water descended in great quantities to the pursuers' shop, causing loss and damage to their goods to the extent of £29 11s 7½d sterling: Finds that although the defender states his having given instructions to a servant occasionally to visit the empty house and see that nothing was going wrong, the party so instructed was not examined, and there is no evidence how long before the burst such

an examination had been made, or in what state the pipes were found to be when it was last examined: Finds that after the burst took place defender employed Mr John Spence, plumber in Airdrie, to repair the pipe: Finds that the plumber considered it necessary to take away upwards of eight feet of said pipe, and when asked by the pursuer, Andrew Ramsay, to show him the pipe that had been taken away, Spence refused to do so on the ground that it had been melted, although when examined on oath he is unable to say how long he kept it, or whether it was before or after Ramsay asked to see it that he caused it to be melted: Finds that on the 14th January, 1870, a quantity of water or melted snow from the roof of said tenement came down to pursuer's shop, causing a further damage of their goods to the extent of £8 1s sterling: Finds that the roof of said house is rather flat, and that there is a leaden gutter for carrying away the roof water, said gutter having a stone cape outside the gutter: Finds that when Chapman, one of Spence's workmen, was sent upon said roof immediately after the accident, he states that he found the water passing through two small cracks in the lead—William Spence says the lead was cracked in three different places—and Mr Spence, senior, says "that a small drEEP of water had been coming through a while before;" that Chapman was sent to the roof, who repaired all the cracks he saw, while Chapman himself says he is not aware of having repaired that part of the roof at all; from these findings, Finds generally: 1st, That the empty house being at the time under the charge of the defender, and there being a crane or stop-cock in the bath-room which, if turned, would have prevented the damage; and 2d, That the plumber employed by the defender after the accident to repair the pipe having removed a larger quantity of pipe than appears to have been necessary, if the pipe had been in good order at the time when it was injured by the frost, and having thereafter destroyed all evidence as to the state of the pipe by melting it down, without allowing an inspection by the pursuers, the presumption is that the pipe was not in a secure or sufficient state: Finds therefore that the bursting of said pipe, and the escape of the water consequent thereon, were caused by the negligence of the defender in not turning off the water by means of said stop-cock, and by allowing the pipe to be in a defective or insufficient state; and, as regards the second accident, Finds that the gutter in question being cracked in two or more places at the time that the snow fell, and afterwards melted, the overflow of said water or melted snow, was caused by the negligence of the defender in allowing the said gutter to be in a defective and insufficient state of repair: Finds in law that the defender is liable to the pursuers for the damage caused both by the bursting of said pipe, and by the overflow of snow water: Therefore repels the defences, decerns against the defender in terms of the conclusions of the summons: Finds the pursuers entitled to their expenses; allows an account of said expenses to be given in, and when lodged remits the same to the depute-clerk of Court as auditor to tax and to report, and decerns.

Note.—It was not disputed at the bar, that if the defender was liable at all, the amount claimed by the pursuers was reasonable and might be assumed as correct, and no counter evidence was led to show that the damage was exaggerated. The difference between the parties was therefore limited to an inquiry as to whether there was such negligence on the part of the defender as to render him liable. The Sheriff-Substitute, in the

preceding interlocutor, has adduced the reasons which led him to think that there was negligence, or rather such trusting to chance on his part as to amount to negligence, and to render him legally responsible for the damage. In regard to the first accident, the house above was unoccupied; no water therefore was required for the use of the inmates; there had been a severe frost for a length of time in the end of December, and yet the stop-cock was not made available, and no inspection of the pipes was made, to ascertain that all was safe. It is notorious that empty houses, where there are no fires, are much colder than when occupied, and consequently that the pipes freeze more rapidly, which rendered it necessary to have a regular and periodical supervision of the empty house, instead of which there is no evidence at what date before the accident any one had visited the house.

Then as regards the state of the roof and gutter, not only is the evidence of the plumbers most unsatisfactory and contradictory, but Mr Thom, the slater, who the defender says was the last person whom he instructed to examine the roof, was not examined, and there is no evidence either that he obeyed the defender's instructions and examined the roof at all, or if he did, at what time he did so, in what state he found it, and in what state he left it.

It is very hard upon the defender to be found liable for damages of this kind, but he has trusted too much to the tradesmen he employed, and it would have been still harder for the pursuers had the loss fallen upon them, who had neither control over, nor authority to interfere with, the pipes and roof in question.

On appeal by defender, the following judgment was pronounced by Mr Sheriff Bell, adhering to Mr Sheriff Logie's interlocutor:—

Glasgow, 6th July, 1870.—Having heard parties' procurators on the defender's appeal, and made avizandum with the proof, productions, and whole process, adheres to the interlocutor appealed against, dismisses the appeal, and decerns.

Note.—This is a narrow case as regards the sum first concluded for in the summons. It was authoritatively laid down in *Campbell*, 25th November, 1864, that unless there be negligence or *culpa* on the part of a proprietor, he is not responsible for damage sustained by a tenant through the bursting of a water-pipe; but the proprietor *was* held responsible in that case in respect he had allowed the pipe to be in a defective and insufficient state. The pipe which gave way in the present instance had been put in about thirty years ago, and to the defender's knowledge had already burst and been repaired five or six years ago. It appears from the evidence of the defender's plumber, William Spence, that both bursts took place within a few feet of each other. It is also in evidence that whilst in the ordinary case of a burst no more than two or three feet of new pipe are required, Spence thought it right, without giving any satisfactory explanation, to cut away upwards of eight feet of the pipe, and to destroy the excised portion as speedily as possible, so that it could not be shown to the pursuer, Andrew Ramsay, who wished to see it, and called at Spence's shop for the purpose. The excerpt from Spence's day-book, No. 16, also shows that he was to charge the defender with repairing eight feet of pipe, which was quite a superfluous quantity, unless there was a weakness in the pipe in the vicinity of the place where the burst occurred. Accordingly, the skilled

witness, Robert Williamson, plumber and gasfitter, depones, "In the position where this burst occurred, it is impossible that more than from two to three feet of new pipe could have been required. If $8\frac{1}{2}$ feet of new pipe were used, I would suppose there must have been some other defect in the pipe besides the burst." Then it is not to be overlooked that the house where the pipe was had been standing empty for seven or eight months, and the fact, which the defender seems anxious to prove, that water-pipes of average strength frequently burst from the effect of frost, seems more against than for him. Since the defender knew this, it was the more incumbent on him to prevent such an occurrence. The means were at his hand; he had only to turn the stop-cock, and if a burst had, notwithstanding, taken place (which was not likely), no evil consequence would have ensued. He says he did not even know of the existence of a stop-cock; but was it not careless of him not to look to see if there was such a thing? He, at all events, knew, or was bound to know, that the pipe was thirty years old, and, as a prudent man, he was hardly entitled to abstain from any inspection of the pipe, and to leave everything to the chapter of accidents during the continuance of a severe frost, which led to the bursting of various pipes in the same locality. On the whole, therefore, though not without some difficulty, the Sheriff has come to be of the Sheriff-Substitute's opinion, that there was *culpa*, not of a grave description, yet sufficient to make the defender liable. As regards the amount second concluded for, as the damage occasioned by the water coming through the roof, the Sheriff has no hesitation in affirming the judgment appealed against. It is plain that the roof was in a defective condition, there being cracks or holes in the leadwork of the gutter through which the rain and melted snow got under the slates and down into the inside of the house; and it took two men a day and a half to solder and repair the roof after the overflow. It is no defence, even if proved, that the defender had desired tradesmen to look at the roof some time before, and trusted to their having done what was necessary, for, as was held in *Cleghorn*, 27th February, 1856, if the fact be that the property is in an insecure or insufficient condition, the landlord is primarily responsible to the party who suffers damage in consequence, though he had employed tradesmen to put it right. But there is, in reality, no sufficient proof that anything had been done for a long time before to that part of the roof where the water got in.

Act.—A. Y. Rose.—*Alt.*—Robert Watt.

SHERIFF COURT OF FORFARSHIRE, DUNDEE.—Sheriffs HERIOT and GUTHRIE SMITH.

ANDREW CONSTABLE v. JAMES SHEERWOOD.—July 7, 1870.

Bond of Presentation—Implement—Time.—On 11th September, 1869, the pursuer, the grantee of a promissory note by one Stewart, caused his debtor to be apprehended upon diligence which he had raised upon that document. Stewart requested time to arrange the matter, and was liberated upon getting the present defr. to grant a bond of presentation, in which the defr. undertook to present Stewart for re-apprehension on 14th Sept., or otherwise to pay the debt. Stewart was duly presented on that day, but requested farther indulgence. This the pursuer's solicitor conceded, on

condition that the defr. would again become bound as before. The defr. accordingly granted a fresh bond of presentation by which he bound himself to present the debtor to the officer holding the diligence, within the office of the pursuer's solicitor upon 17th September, "betwixt the hours of one and three o'clock afternoon," for apprehension, and he undertook, in the usual way, that the debtor should then be equally liable to diligence. And failing his so presenting the debtor, or in case he should have obtained protection from imprisonment, the defender bound himself to pay the debt, interest, and expenses.

This action was raised upon the bond, and concluded for payment by Sherwood of the debt referred to, interest thereon, and expenses, conform to account thereof produced. The pursuer, after setting forth the circumstances above mentioned, averred that the defr. failed to present the debtor at the place of presentation at any time between the hours specified; and that an officer had attended the whole time prepared to execute the warrant, but Stewart failed to appear, and some time after three o'clock the officer left. The defr. denied failure to present, and stated that the debtor presented himself "before half-past three o'clock," accompanied by a friend, and that they had a long interview with the pursuer's solicitor in the defr.'s absence, "negotiating for a settlement of the debt." He also stated that the debtor made "no attempt to evade presentation," and that the pursuer had subsequent opportunities of apprehending his debtor, and had thus suffered no prejudice. The pursuer asked decree upon the facts as appearing from the statements of parties, but a proof was allowed.

From the evidence led it appeared that on the day of presentation the defr. about a quarter before three went to seek the debtor in order to have him presented; that he found him waiting for a person from whom he expected assistance; that he failed to get it, and they then went towards the place of presentation; that about one or two minutes' walk from it they met the officer returning, who declined to go back, as it was past three, but said he would be at hand if sent for; that having reached the place of presentation about ten minutes past three, the debtor noticed another friend from whom he thought he might get help, and went to ask it, while the defr. called at the place of presentation to say the debtor would be there immediately; that Stewart (the debtor) and the friend he last spoke to went away to the market place, and after waiting there went next to a public house with some persons with whom the friend had business; that they finally went to the place of presentation some time between half-past three and a quarter to four; and the defr. having again called about that time found they were with pursuer's solicitor, and did not join them. It also appeared that pursuer's solicitor declined to treat respecting the debt now sued for, and that the interview of parties had reference to another debt Stewart was owing pursuer.

The defr. pleaded (1) that his obligation was gratuitous and not to be strictly construed, and he had *bona fide* presented the debtor; (2) that he was freed by the alleged subsequent negotiation; and (3) that the pursuer having had ample subsequent opportunities to apprehend Stewart and not having done so, he could not hold defr. liable for the debtor's non-apprehension. Pursuer pleaded that defr. having failed to present at the time and place specified, the obligation in the bond had become absolute, and pursuer was not bound to incur farther expenses and trouble by thereafter attempting to apprehend the debtor.

The following authorities were referred to:—*M'Gowan v. Neilson*, 8 S. 142; *Dickson*, 9 D. 679; *Shaw's Bell's Com.*, p. 297; *Campbell on Citation and Diligence*, p. 257; *Menaies' Lectures*, p. 295; *Bell's Prin.*, ss. 262, 278.

The S.S. issued the following interlocutor:—

Dundee, 23d June, 1870.—The S. S. having heard parties' procurators, Finds that on said 17th September, the said David Stewart was not presented as required by said bond: Therefore repels the defences: Finds that the defender is liable in the sums sued for, subject to taxation of the expenses claimed: . . . Remits the account of said expenses to the auditor of Court to tax and report; further, Finds the defender liable in expenses: Allows an account, etc.

Note.—It was argued for the defender that there was here substantial implement of the obligation, such as was held to have taken place in the case of *M'Gowan*, 27th November, 1829, 8 S. 142, where the obligation being to present the debtor by one o'clock, he appeared at half-past twelve, and not finding the creditor, went away and came back at half-past one. But in this case a latitude of two hours has been taken for the express purpose of avoiding any such question, and, as Professor Bell observes, "as the prisoner is by the cautioner's interposition redeemed from actual imprisonment on the sole condition that he shall be presented at a particular hour and at an appointed place, the creditor has a right to insist on strict observance, for the whole effect of his diligence may be defeated by the debtor being allowed one hour's indulgence longer."—*Bell's Com.*, vol. i., p. 297.

After alluding to the debtor's proceedings on the day of presentation, as above detailed, the note proceeds—The S.S. is of opinion that this was no compliance either in *terminis* or in substance with the obligation contained in the bond, and therefore that the defender's liability for the debt was clearly incurred. It was argued that if the obligation was incurred, the cautioner was liberated by the delay and indulgence which were subsequently granted to the debtor. But there is no evidence of any positive undertaking to give him time, and mere forbearance is not enough.—*Fleming*, 2 S. 336.

Upon appeal, the Sheriff adhered, adding to his interlocutor the following

Note.—In *M'Gowan's* case founded on by the defender, the obligation was to make the debtor forthcoming by one o'clock. There he went to the place at half-past twelve which was by or before one o'clock, and again at half-past one. The form of bond in the present case is better than if it said by one o'clock, or at one o'clock. Then in place of saying at two o'clock, it is "betwixt the hours of one and three o'clock afternoon." This seems to save the Judge determining such nice questions as whether a couple of minutes past two is at two. Then there is a considerable latitude allowed of two whole hours, but having such latitude, it seems to the Sheriff that an additional half hour or three quarters of an hour cannot possibly be expected. This form of bond seems to the Sheriff to save the Judge determining more than the question whether the obligation in the bond was complied with or not as to time, making due allowance possibly for variety of clocks. Looking to the evidence, the Sheriff is inclined to think that the debtor in this case did not appear till about three quarters of an hour past three o'clock. He was certainly long past three, making every allowance for difference of clocks. The Sheriff is glad to be saved determining such questions as whether fifteen minutes, or thirty minutes, or forty-five minutes, or sixty minutes, should be allowed over and above the time specified by

the parties in their bond. A Judge may be able to interpret the terms of the bond, and whether or not it has been complied with; but he has no data for determining the other question, "what period is to be allowed over and above that agreed on between the parties?"

Act.—Swanston.—Alt.—Heron.

SHERIFF S. D. COURT OF PERTHSHIRE.—*Sheriff BARCLAY, LL.D.*

A. v. B.—Aug. 9.

Outgoing and Incoming Tenant—Road Money—Income Tax.—The Notes of the learned S. S. show the nature of the case. They are as follows:—

This is an action by the pursuer as outgoing tenant of the farm of Balgarvies, in Forfarshire, against the defr. as incoming tenant of the farm, for relief and repayment of road money and income tax payable for the said farm for the year 1868-9, according to their respective periods of possession. Pursuer left, and defr. entered to the farm at Marta, 1868. Pursuer maintains his claim of relief according to the respective periods of occupation. Defr., on the other hand, pleads for *total* exemption and to impose total liability on pursuer as reaping the crop of 1868. The question therefore is, whether the occupation in such circumstances is reckoned simply according to time, or whether it is to be reckoned to the beneficial occupancy, which of course brings in the reaping of the crop as the chief element of benefit? On this last question, so far as regards the road tax, it was stated at the discussion that successive Sheriffs at Forfar had given opposing decisions. As to the road money, the County Act 1810, s. 6, authorises the assessment to be imposed on 1st July of each year on all the then occupiers of land. The assessment is described as yearly, and s. 12 enacts that the assessment shall be payable yearly on 1st July. The 1st assessment under the statute would fall to be imposed on 1st July, 1810 for the year following. There is nothing in the Act as to crop or division between tenants. The pursuer produces a receipt for the road money "on rental due 1st July, 1868." It is not stated for what year, but it must have been for the year ensuing that date. The purpose being the upholding of the roads in the county, the consequent benefit was as much or more received by the tenant in possession from Martinmas to 1st July than by him who possessed in the lesser period of the 12 months. It therefore appears to the S.S. that the proper division of the sum is by the mere reckoning of time, irrespective of crop. As to the income tax, it is received from the 5th April in every successive year. The pursuer produces his receipt for "the duty for the year ending 5th April, 1869, charged under schedule at the rate at 6d per £1." This tax is not an heritage or profits of trade, but is a personal tax on the occupier of land according to the standard of rental, or a proportion thereof deemed the tenant's profit. The third rule under s. 63 of the Act (p. 255 of the official Statutes) provides that "every tenant, on quitting the occupation, shall be liable for the arrears at the time of so quitting, and for such further portion of time as shall then have elapsed and repaid to the occupier by whom the same shall have been paid; and every tenant quitting before the time of making the assessment shall be liable for such portion of the year as shall have elapsed at the time of his so quitting, to be adjusted and settled by the Commissioners." Granting that these provisions do not in precise terms apply to the state of facts now in hand,

nevertheless, they clearly recognise a division of the tax according to the time of occupancy, without reference to reaping of the crop. It is understood that the English Poor Law proceeds on a similar rule of division by time; and the opinion of the Board of Supervision in Scotland will be found expressed in similar terms (9 P. L. Mag., 463). In a recent case in the Queen's Bench, 2d June, 1869, (Magistrates Session Cases 72,) the Court unanimously held with regard to poor's rates that "the outgoing tenant continues liable *de die in diem* up to the moment of the new tenant coming in, and he then only ceases to be liable." The outgoing tenant was there held liable for an intermediate period when there was no occupancy by any one. If beneficial occupancy were the rule there might be no small difficulty in pasture farms, and still more with farms partly arable and partly grass, to allocate the amount of benefit. Even in the usual practice of Whitsunday entry to houses and grass, and to the arable land on separation of crop, there would arise questions as to value. To take as a general rule the period of occupancy is preferable, being one of simple proportion. The tenant entering has the same rule of division when he in turn is the tenant voiding possession. The only discord would arise by a change of rental. A tenant entering on a lower rent would thus be taxed at a higher standard, and where there is any very serious change in this respect, there does appear room for adjustment; but even this admits of a very easy process of calculation.

Act.—Horace Skeels. — *Alt.*—Robert Robertson.

SHERIFF SMALL DEBT COURT OF AYRSHIRE, IRVINE.—
 Sheriff-Substitute ROBISON.

REID v. BRACKENRIDGE.—August 20.

General Turnpike Act—Liability for Toll Duties.—This was an action raised by Reid, tacksman of Ardrossan Roadhead Toll Bar, against Brackenridge, a carter in Ardrossan, for £1 13s conform to account which was as follows:—"To toll-duties due by the said Robert Brackenridge on horses and carts belonging to him for passing and re-passing the toll-bar at Ardrossan Roadhead on the respective dates after-mentioned, by using a private road belonging to Lord Eglinton or other person, in carting of stones, etc., from Ardrossan Quarry, Ardrossan, to house belonging to George M. Neilson on turnpike road between the said toll-bar and check-bar at Meadowfoot." The pleas on which the case was decided are disclosed in the following judgment:—

In this case the defender's agent took the preliminary objection that the action was irrelevant, inasmuch as it was admitted in the account attached to the complaint, that the defender's carts had not passed through the toll-bar on the dates libelled, and thus no liability for toll duties had been incurred. At first it crossed my mind that a toll-keeper is entitled to say to any person who avoided his toll by using a bye-road to reach your destination, "you ought to have passed through my toll-bar, and whether you did so or not I am entitled to exact payment of toll-duty;" in short, that by the defender's passing along this private road, there was such a constructive use of the turnpike road as to render him liable for toll. On more mature consideration, I have, however, arrived at a different opinion. Although nominally an action for toll-duties, this is substantially a pro-

secution for evasion. In the case of tolls, it must be remembered we are dealing with a statutory fund, constituted by statute, first, in the shape of toll-duties which the tacksman may levy, and, second, in the form of penalties for which the tacksman can only prosecute when authorised to do so by the district road trustees. I must hold that liability for toll-duties, for which the toll-gatherer *quod* tacksman of the toll may sue, is only incurred by actually passing through the toll gates. In the case of *Mitchell v. Morrison*, 26th June, 1839, 1 D. 1115, the Lord Ordinary (Cringletie) distinctly says, "If a person evades the toll by taking a private road, the toll-gatherer could not pursue him *at common law* for the toll. There is no such right at common law as to compel a man to take any road but what he pleases to use. The whole is statutory, and consequently as the toll-gatherer cannot demand actual tolls except from those who pass through the gate, there is no other mode of enforcing payment of tolls but by enforcing the penalties, and by doing so the attempts at aggression are rendered less probable or frequent." The account attached to the complaint shows that this is really a case of evasion for which a prosecution can only be raised with the authority of the road trustees; and for which the infliction of a penalty is the statutory remedy. The defender is alleged to have passed the toll-bar, "by using a private road." Sect. 45th of the General Turnpike Act enacts, "That if any person shall with any horse, cattle, beast, or carriage pass to or from any turnpike road, over any land near or adjoining thereto (not being a public highway) such person not being the proprietor, or occupier, or servant, or one of the family of the proprietor or occupier of such land, with intent to evade payment of any toll-duty, every person so offending shall forfeit and pay any sum not exceeding five pounds for each offence." Not a word is said about toll-duties. This being a penal clause must be strictly interpreted, and the penalty specified held to be the only statutory restriction on evasion. The pursuer's procurator farther argued that the defender's carts having emerged from the private road on to the turnpike road, and travelled thereon for upwards of 100 yards, he was thus rendered liable for toll-duty. I cannot sustain that view. Sect. 37th of the General Turnpike Act provides that no toll shall be demandable "for any horses, cattle, or carriages, which shall not travel altogether above one hundred yards on any road in whole or in part before or after passing any bar at which toll duty is leviable for using the same." The criterion of liability is here laid down to be travelling of above one hundred yards *before or after passing any bar*. But in this case the defender's carts never passed through the toll-bar at all.

I can therefore arrive at no other conclusion than that the present action must be dismissed.

Act.—James Dickie.—All.—W. D. M'Jannet.

SHERIFF S. D. COURT OF PERTSHIRE.—Sheriff BAROLAY, LL.D.

ROY v. NORTH BRITISH RY. CO.—Aug. 31.

Carriers' Act, 11 Geo. IV. and 1 Wm. IV., c. 68—Declaration—Separate Packages.—In this case, which is fully explained in the S. S.'s notes given below, defra, without admitting liability, settled the claim, but as the point raised was undecided, and the facts were all before the Court, the Sheriff favoured the parties with his opinion.

The facts of the case are these:—Two separate parcels of china were at the same time despatched by the same consignor to the pursuer as consignees by the defenders' railway. The one was a hamper, the other was a barrel. Both were charged according to weight as one consignment, and so entered in the railway documents, but distinguishing the two parcels. The barrel arrived safe, the hamper was smashed. The pursuer sued for damages. The defence was founded on the Carriers' Act for want of a declaration of value. It appears that neither parcel exceeds in value £10, but that both unitedly carried the value above the score. The question then comes to be whether the consignment must be viewed as one and indivisible both jointly as forming one consignment. In one view declaration was necessary to found a claim; in another view declaration was not necessary. The S. S. has made inquiry at his brethren in Edinburgh, Glasgow, and Dundee as to whether any such case had occurred in the extensive courts there. He finds none such has as yet arisen, and he learns from them a diversity of opinion as to the law in such cases. In one seat of justice the Sheriffs consider that the consignment must be held as one, and that the declaration of value was therefore necessary; and in the other two the opinion is on the other side. The S. S. is very clearly on the side of separate liability. The words of the statute are in the singular number. Sec. 1 enumerates certain articles as "contained in any parcel or package;" and "where the value of such article or articles, or property contained in such parcel or package exceeds in value £10," sec. 2 requires notice "where any parcel or package contains articles the value of which shall exceed £10." The S. S. would not desire to press the grammatical plea too far, as frequently what is prescribed as the rule for one is equally and of necessity the rule for more. But here the policy of the law interprets the meaning of the legislature. Previous to the statute, the responsibility on public carriers under the Roman edict engrafted into Scotch law was very severe; in fact, they were made insurers of property of indefinite value, without any corresponding premium being paid to cover such risk. The Carriers' Act limited this liability to the extent of £10, and unless all parcels above that sum are declared and paid for at extra rates the risk of insurers was obviated, and their liability was limited to *culpa* laying the *onus* on the owner instead of the carriers. It is clear that the object of the declaration was to certiorate the carrier of the increased value and risk attached to each individual parcel, and to avoid which more than usual care might be bestowed on such valuable parcels. Where a party chooses to conceal the value of any one parcel, he takes its risk on himself—in fact, becomes his own insurer. Where he declares the value, he purchases an insurance from the carrier. From all this it must appear that each parcel must be declared separately. Suppose, at the same time, two or more parcels are sent by one consignor to one consignee, the *cumulo* amount of which is far beyond the statutory value, but one only of the number contains articles of the enumerated class, but under that value, the carrier could never be held liberated because of the non-declaration of that value. In the same way as here, two parcels of the same class, with separate values under £10, but jointly more than that value, are delivered, there is no call for separate declarations any more than if these were made by two consignors to the same consignees, or by the same consignor on different days. The mere accident of two or more despatches being sent at the same time by the same

party to another individual, cannot at all affect the general principle, that the carrier of every and any packet below £10 in value without declaration of value, or above that sum when declared, becomes the insurer of every separate package; and above that sum, where not declared, the risk of each such parcel remains with the owner as the insurer by adoption.

Act.—George Kyd.—Alt.—John M. Miller.

SHERIFF COURT OF AYRSHIRE (KILMARNOCK DISTRICT).—
Sheriff ANDERSON.

LITTLE v. M'PHERSON.—Sept 1.

Sale by Auction—Mistake in Bidding.—The pursuer, on 21st April, 1870, presented a summary petition to the Sheriff, praying that the defender should be ordained to deliver up to him a black or dark-brown horse, purchased by him at a public roup on the 18th of March preceding, and wrongously taken possession of, and retained by the respondent. The defences were, substantially, (1) that the respondent was truly the purchaser of the horse in question, and had as such received delivery of him; and (2) that the pursuer, by taking delivery of and using another horse, sold at the same roup, and by delay in bringing the action, was barred from insisting therein. After proof had been led, the defender farther maintained in argument, that the pursuer never having become vested by delivery with a real right of property in the disputed animal, could not, whatever other remedy he might have, sue a *rei vindicatio*; but there was no plea to this effect on record, and the objection, it was held, on the other side, was inapplicable to the circumstances. These will sufficiently appear from the Sheriff-Substitute's judgment, which has been acquiesced in by the defender:—

"Kilmarnock, 1st September, 1870.—The Sheriff-Substitute having heard parties' procurators, and considered the closed record, proof on both sides, productions, and whole process, Finds the action is at the instance of William Little, innkeeper and horse hirer, Kilmarnock, and seeks delivery from the respondent, Daniel M'Pherson, innkeeper there, of a black-brown horse, sold at a public sale in March last, and wrongfully taken possession of by the respondent: Finds that on the 18th of March, 1870, there was a sale by public roup of horses, carriages, harness, etc., belonging to the sequestrated estate of Robert Little, then lessee of the Black Bull Hotel, Kilmarnock: Finds that the horses were taken out to the open street at some distance from Black Bull stables, and there sold one by one in the centre of a great crowd of people: Finds the horses were sold in the order in which they stand in the printed bill, No. 7 of process, down to the horse in dispute, being the eighth horse in said bill, and there entered 'Brown Horse Tommy:' Finds that from some unexplained cause the horse in dispute was not brought forward at the moment it was wanted: Finds that the auctioneer became impatient, and called out to the people in charge of the animals to come on with some horse, when the horse, the eleventh of the printed bill, and there entered as 'Black Horse,' without any name, was led into the ring: Finds the auctioneer then put him up for sale, saying, 'We will call this horse Tommy,' or 'Who will bid for the Tommy horse,' or some such similar words: Finds that the respondent, who had examined and valued the horses he intended to purchase, was at

this time standing in the crowd, but not near enough to see inside the ring: Finds that the respondent, under the erroneous belief that the horse then exposed was the 'brown horse Tommy,' eighth of the printed bill, bade for it, and became the purchaser at seventeen pounds sterling: Finds that immediately after the black horse, No. eleven of the printed bill, had thus been sold to the respondent, the brown horse Tommy, No. eight of the printed bill (being the horse in dispute), was exposed, and purchased by the petitioner for nineteen pounds sterling: Finds that the horses, after being sold on the street, were led back to the stables of the Black Bull: Finds that on the evening of the sale, the respondent, in the belief that he had purchased the 'brown horse Tommy,' but without any right or title whatever, removed him from the Black Bull stables, has since retained possession of him, and refuses to give him up to the petitioner, who was the actual purchaser, and who paid for him, as per receipt No. eleven of process: Therefore ordains the respondent to restore the said horse to the petitioner within fourteen days from the date hereof, and in the event of his failing to do so decerns against him for twenty-five pounds sterling, in terms of the prayer of the petition: Finds the respondent liable in expenses, allows the petitioner to give in an account thereof, and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—No one reading the evidence in this case can doubt that the respondent was misled by the very thoughtless, if not improper conduct of the auctioneer, in calling an unnamed horse by the distinguishing name of the very animal which in proper rotation ought then to have been sold. But that is a matter with which the petitioner has no concern. The simple issue raised here is, who in point of fact purchased the horse in dispute? It is quite clear the petitioner did so. The Sheriff-Substitute does not think there is anything in the case to justify the plea of *mora* or of acquiescence."

Act.—J. & J. Sturrock.—*Alt.*—D. R. & T. B. Andrews.

English Cases.

LEGACY OR SUCCESSION DUTY.—*Money directed by will to be laid out in land—Predecessor.*—E. succeeded as heir-at-law of S., to a sum of money, which had, by the will of J., in 1799, been directed to be laid out in land, and to which S. had under the will become absolutely entitled. The money had not been laid out in land, nor had S. dealt with it in any way:—*Held*, by Kelly, C.B. and Channell, B., that E. was chargeable with legacy duty, and not with succession duty:—*Held*, by Bramwell, B. and Cleasby, B., that E. was chargeable with succession duty at the rate of £5 per cent. as on a succession from S. as "predecessor."—*De Lancey v. The Commissioners of Inland Revenue*, 38 L.J. Ex. 193.

PROBATE DUTY.—A married woman entitled as next-of-kin to property of an intestate died without asserting her claim, leaving her husband, who also died without asserting his claim. The next-of-kin of the husband took proceedings to enforce the claim of the married woman, who was their mother. These persons, as also their parents, were domiciled abroad:—

Held (aff. judgment of Ex Ch.), that duty was payable on the letters of administration granted in respect of the estate of their father, the husband, as well as upon the letters granted in respect of the estate of their mother, the married woman, and that *ad valorem* duty was properly charged upon the whole property upon each transmission:—*Held* (Lord Westbury diss.), that the payment of the duty was not to be affected by the circumstance that the distribution of the property belonged to a foreign country:—*Held*, also, that the duties were payable, not only upon the principal property constituting the estate of the original intestate, but also upon the accumulations of interest thereon between her death and the grant of letters of administration. *Gutteridge v. Stilwell*, 1 Myl. & K. 486, observed upon.—*Partington v. The Attorney-General* (H. of L.), 38 L.J. Ex. 205.

INSURANCE ON LIFE—*Policy not containing name of person interested*.—By 14 Geo. III., c. 48, s. 2, a life policy in which there is not inserted the name or names of the person or persons interested therein, or for whose use, benefit, or on whose account the policy is made, is unlawful. A husband, whose wife was a minor and entitled to a sum of money on attaining the age of twenty-one, applied to her trustees for an advance, which they agreed to make upon having the re-payment of it secured by one J. in the event of the wife dying before attaining twenty-one. J. having consented to become security upon condition that an insurance was effected on the life of the wife, a policy was executed by an insurance company which was expressed to be made between them and the wife, who was described as a married woman. Neither the name of the husband nor that of any other person beside the wife was inserted in the policy as being interested in it:—*Held*, that the policy was void, as not containing the name of the husband or other person interested in it.—*Evans v. Bignold*, 38 L.J. Q.B. 298.

VOLUNTARY SETTLEMENT—*Power of revocation*—*Agent and client*.—It is the duty of a solicitor, in preparing a voluntary deed of gift, to protect his client by inserting a power of revocation; and the absence of such a power will invalidate the deed, unless those who claim under it show that the donor deliberately and with full knowledge of the consequences, refused to have the power inserted.—*Coutts v. Acworth*, 38 L.J. Ch. 694.

WINDING-UP—*Contributory*—35 Geo. III., c. 63—*Stamp*.—A member of a mutual marine assurance association, who had never received a stamped policy of insurance on his own ship, was held not to be a contributory.—*Smith's case*, 21 L.T. Rep. N.S. 97; 38 L.J. 681.

WINDING-UP OF COMPANY—*Interest*.—When a company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the commencement of the winding-up, unless the estate is sufficient to pay all debts in full, in which case alone subsequent interest can be claimed.—*In re Humber Iron Works and Shipbuilding Co.* (The Warrant Finance Co.'s Case), 38 L.J. Ch. 712.

DAMAGES—*Liability of owners of dogs for injuries to cattle or sheep*.—By 28 and 29 Vict., c. 60, s. 1, after reciting that it is expedient to amend the law as to the liability of the owners of dogs for injuries done to cattle and sheep by such dogs, it is enacted that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on

the part of such owner:"—*Held*, that horses are included under the term cattle in this enactment.—*Wright v. Pearson*, 38 L. J. Q. B. 312.

BRIBERY—*Municipal Election*—17 and 18 Vict., c. 102, s. 2.—By the 17 and 18 Vict., c. 102, which, by 22 Vict., c. 35, s. 12, applies to municipal as well as parliamentary elections, any one who shall "give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any other person, in order to induce any voter to vote, or refrain from voting, is guilty of bribery." Deft., while soliciting a vote, told the voter that he would "be remunerated for loss of time:"—*Held*, that deft. had been guilty of bribery within the meaning of the section.—*Simpson v. Yeend*, 38 L. J. Q. B. 313.

CONFLICT OF LAWS—*Judgment recovered*—*Lex fori*.—A plea of judgment in favour of deft. recovered in the Court of a foreign country on the Statute of Limitations of that country, is not an answer to an action brought here for the same cause of action. In the case of an attorney's bill of costs for the conduct of a suit in an inferior Court, and also on appeal, the Statute of Limitations does not begin to run until the termination of the suit in the appellate Court. The plaintiffs, attorneys in partnership in the Isle of Man, were employed by deft. in March, 1858, to conduct a suit in the Ecclesiastical Court of that island, in which suit he was a party. The Ecclesiastical Court pronounced judgment in favour of deft. in April, 1861, but the case was brought on appeal to the appellate Court of the island by the other parties to the suit in Sept., 1861, and the litigation proceeded there till April, 1865, when the judgment of the appellate Court was pronounced. The partnership of plts. had been dissolved in Oct., 1862, from which time one of them only had the conduct of the suit. An action was brought in the Deemster's Court of the Isle of Man to recover the amount of plt.'s bill of costs up to the time of the dissolution of partnership, and the Manx Statute of Limitations (three years) having been pleaded, judgment was given for deft. on that ground. An action afterwards being brought in this country for the same cause of action:—*Held*, that a plea of the judgment recovered in the Isle of Man Court was not a bar to the action, such judgment not being one on the merits of the case:—*Held*, also, that the employment of plts. was a continuous one, and that the Statute of Limitations did not begin to run against their claim until after the termination of the suit in the Court of appeal.—*Harris and another v. Quine*, 20 L. T. Rep. N. S. 947; 38 L. J. Q. B. 331.

BOTTOMRY—*Hypothecation of Cargo*—*Advances of Freight*—*Commission*.—A ship on a voyage from Galveston, United States, to Liverpool, put into Bermuda disabled. The master wrote to the owners of the ship and cargo, and meanwhile, to avoid delay and loss, commenced repairing the ship. The repairs were completed, and the master then, fearing detention of the ship, and having received no replies from the owners of the ship and cargo, raised money to pay for the repairs on bottomry of the ship, freight, and cargo. The lenders were not the repairers of the ship. In a suit by the bondholders against the owners of the cargo:—*Held* (affirming the judgment of the Court below), that the bond was valid and bound the cargo. The necessity which will validate the hypothecation of a cargo by bottomry is a high degree of need, arising when choice is to be made of one of several alternatives, under the peril of severe loss, if a wrong choice should be made.

And any combination of events which should prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. If, though the repairs are complete, yet the ship cannot leave the port until they are paid for, the completion of repairs is an immaterial fact in estimating the degree of need for bottomry. The possibility of communication with the owners of the ship or cargo must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure, after every exertion made. Advances, not stipulated for in the charter-party, were obtained by the captain from the charterer. The receipt, given by the former, promised to pay the said advances "out of the proceeds of the present freight, with the addition of £10 per cent per annum and charges for insurance:"—*Held* (reversing the judgment of the Court below), that the sums obtained were advances of freight to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the charterer, unless he should have used the stipulated premium in insuring. A usage to establish a right to deduct commission for obtaining the charter from the freight as against the holder of a bottomry bond, must be distinctly proved.—*The Karnak*, (P. C.) 21 L. T. Rep. N. S. 159; 38 L. J. Adm. 57.

BENEFIT BUILDING SOCIETY—*Validity of certified rules.*—Conclusiveness of certificate of the barrister appointed to certify the rules of savings banks as to the validity of the rules of a benefit building society established under 6 & 7 Will. IV., c. 32, not repugnant to the Act, or contrary to law.

One of the certified rules of a benefit building society, established under 6 & 7 Will. IV., c. 32, empowered the trustees from time to time, as occasion should require, to borrow money at interest not exceeding £5 per cent, for which they might give their own personal security, and should be indemnified out of the first funds of the society which should be received, provided that the total amount of money to be so borrowed should not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society:—*Held*, on demurrer, that there was nothing in the rule repugnant to the Building Societies Act, or contrary to the general law of the land, and that the rule was valid.—*Laing v. Reed, &c.*, 39 L. J. Ch. 1.

CONTRIBUTORY—*Agreement to take shares*—*Failure of company before the time fixed for payment*—*Personal liability of executors taking shares.*—Reserved shares in a Joint Stock Company were offered by the directors to shareholders and the representatives of deceased shareholders, "The shares if taken up, to be paid for on or before the 1st of October next. If paid before that time interest to be allowed," "the shares to be then entitled to one quarter's dividend at the end of the year:"—*Held*, that an acceptance of this offer constituted an executed agreement for a present interest in the shares, which made the acceptors liable to contribute, though the company was wound up before the day fixed for payment:—*Held* also, that executors who accepted such shares, though in their representative character, were personally liable to be put on the list of contributories as shareholders in their own right.—*Jackson & Holmes v. Turquand*, (H. of L.), 39 L. J., Ch. 11.

COMPANY—*Power to accept bills.*—A company, the nature of whose

business required that it should accept bills of exchange, entered into an arrangement to make an advance to L. upon the security of certain specified shares and other similar securities. The regulations of the company provided that the directors might accept and indorse bills, and the number of directors necessary for the transaction of business was left to the discretion of the board. A resolution of the board empowered the chairman to accept on behalf of the company, and in favour of L., bills to the amount of the agreed loan, upon L. depositing the securities to the amount agreed upon. The chairman, professing to act under the authority of this resolution, accepted the bills and gave them to L., who deposited the securities, but to an amount considerably below the agreed amount. No one in fact examined the securities deposited on behalf of the company. The board afterwards confirmed the transaction, but apparently in ignorance that the securities had not been duly deposited;—*Held*, aff. *Master of the Rolls*, that the bills in the hands of a *bona fide* holder for valuable consideration, were valid against the company.—*In re Land Credit Co. of Ireland (Lim.)*; *Ex parte Overend, Gurney & Co.*, 39 L. J., Ch. 27.

COMPANY—Powers of directors—Imprudent purchase—Liability for loss of capital and for damages.—Bill by a company in liquidation against its surviving directors, and the executors of a deceased director, seeking to make them liable for all loss sustained, by reason of their having purchased the good-will, and undertaking the liabilities of a bill-broking and money-dealing business, which had turned out a losing concern. The bill showed that the directors were authorised by the memorandum and articles of association, to purchase the business in question, upon such terms and under such stipulations as to guarantee or otherwise as might be agreed upon; but alleged that, under the circumstances of the case, the directors ought not to have completed the transaction without the sanction of a general meeting, and that they had in fact exercised their functions so imprudently, with such want of wisdom and judgment, both in purchasing the business at all, and in not taking mortgages on the private property of the vendors, that they ought to be fixed with the consequences thereof. The bill contained no charge of fraud, *mala fides*, or personal misconduct against the directors:—*Held*, by *L. Hatherley, C.*, on demurrer by the executors of the deceased director, that the bill could not be maintained in a Court of Equity for any loss beyond the money which had passed into the director's hands; and that, with regard to the capital which had to come into their hands, looking at the fact that the main object of the company was to purchase a business necessarily of a hazardous and speculative character, the charges in the bill did not amount to such a breach of trust on the part of the directors as to fix the estate of the deceased director with liability for the loss which had accrued; that the purchase of the business being strictly *intra vires* of the directors, it was not necessary to obtain the sanction of a general meeting; that the power to purchase under such stipulations as to guarantee as might be agreed upon, did not imply that the directors were bound to take mortgages on the property of the vendors.—*Overend, Gurney & Co. (Lim.) v. Gurney*, 39 L. J. Ch. 45.

TRADE MARK.—The proprietors of a long-established comic periodical named "Punch," moved to restrain the publication of "Punch and Judy," a rival publication of like character, and of the same size and somewhat similar appearance to "Punch," but with a different illustration on the cover, and sold at a less price. Another well known periodical was sold under

the name of "Judy:"—*Held*, by *Malins, V.C.*, that the adoption of the whole title "Punch and Judy" was no infringement of plt.'s right to use and property in the name "Punch;" and that the general public were not likely to be misled into purchasing the deft.'s publication by mistake for that of plt.'s. Motion for injunction refused.—*Bradbury v. Beeton*, 39 L.J. Ch. 57.

MARINE INSURANCE—Right to recover costs of successfully defending a collision suit, under a suing and labouring clause in the policy, or as money paid. Negatived, affirming judgment of Court of C.P. *ante*.—*Xenos v. Fox* (Ex. Ch.), 38 L.J. C.P. 351.

ARBITRATION—*Boat-race—Jurisdiction of referee*.—K. and S., two watermen, agreed to row a "right away sculler's race" upon the river Thames; the start to take place at half-past two p.m.; the rowing to be according to the recognised rules of boat racing, and a referee to be chosen, "whose decision should be final." In watermen's races it is the practice for the men to start themselves. A referee was appointed, and the race commenced, but a foul having taken place, the men were ordered by the referee to row over again. On the following day they came to the starting place. After several fruitless attempts to start, K. rowed up to the referee's steamboat, which had drifted out of sight of the men, and complained that S. would not start. The referee looked for S., but not seeing him, told K. to inform S. that he must start, and that if he would not to row over without him. K. then rowed off, and the referee afterwards saw him row over the course, but did not hear him speak to S. The referee thereupon decided that K. was entitled to the stakes; and it was found by the jury in an action against the stakeholder, that the referee's order was not communicated to S., and that a fair opportunity of starting was not given to him:—*Held*, aff. decision of Court of Q. B., that, under the agreement, it was necessary to empower the referee to award the stakes, that there should be a race or a start, and that it was essential to a start, that the referee's directions should be conveyed to S. That, in the absence of any such communication, there could have been no fair start, so that the referee's decision was without jurisdiction and void. Per *Willes, J.*—That if the referee had decided, though upon insufficient evidence, that the communication was duly made to S., his decision as to the person entitled to the stakes would have been final, but that he appeared to have neglected to decide whether what he had imposed as a condition of the start had been fulfilled.—*Sadler v. Smith* (Ex. Ch.), 39 L.J. Q.B. 17.

MALICIOUS PROSECUTION—*Reasonable and probable cause—Onus probandi*.—In an action for malicious prosecution it appeared that deft.'s traveller applied to one P. for payment, that P. shewed him a receipt of plt. (who had formerly been deft.'s traveller) for £20, which he had never accounted for, that deft. on learning this, communicated with P., who sent the receipt and reaffirmed the payment, that deft. then consulted his attorney, and charged plt. with embezzlement before the magistrates, who dismissed the charge; it also appeared that there were other cases which if known to deft. would clearly have justified him in making the charge, but it was not shewn whether he knew of them when he made it:—*Held*, that plt. had failed to shew the absence of reasonable and probable cause because (*per Bovill, C.J.*) the facts of P.'s case showed reasonable and probable cause, or because at all events (*per Byles, J. & Brett, J.*) as plt. did not shew the contrary, deft. was to be assumed to have known of the other matters.—*Brooks v. Blain*, 39 L.J. C.P. 1.

EVIDENCE—*Oral contemporaneous agreement limiting operation of written contract—Bill of exchange.*—In an action by payee against drawer of a bill of exchange, payable 12 months after date, deft. pleaded that the bill was drawn for the accommodation of the acceptor and as surety for him, and at the time of the drawing and delivery of the bill to plt., it was agreed between plt., deft., and the acceptor, that the latter should deposit with plt. certain securities, viz., a lease and dock warrants, and that in case the bill should not be duly paid plt. should sell such securities, and apply such proceeds in payment of the bill, and that until so sold deft. should not be liable for the bill. The plea alleged the deposit by the acceptor of such securities on the above terms, and that plaintiff had not sold them, but still held them:—*Held* (*Willes, J. dubitante*), that as the agreement stated in the plea varied the terms of the written contract on the bill, oral evidence of it was not admissible.—*Abrey v. Cruz*, 39 L.J. C.P. 9.

COMPENSATION—*To mine owner—Award under Lands Clauses Act—Railways Clauses Act.*—An arbitrator, appointed under the Lands Clauses Act, directed that a railway company should pay to mine owners certain sums in respect of expenses not actually incurred at the time of the award, ex. gr., the expense of an extra engine and plant, of working the same, of a new pit, and of fresh spoil land. He at the same time found, as a matter of fact, that the above items of damage or expense were "all matters then apparent, and capable of being ascertained and estimated, and that he had awarded compensation accordingly."—*Held*, that on the above finding, claimants were not precluded by the terms of s. 81 of 8 Vict., c. 20, from at once recovering in respect of the several items mentioned in the award, the same being awarded in respect of loss, damage or expenses then imminent and capable of being ascertained.—*Whitehouse v. The Wolverhampton and Walsall Rail. Co.*, 39 L.J. Ex. 1.

NEGLIGENCE—*Sale of deleterious Hairwash—Husband and Wife.*—Hairwash compounded by deft., a chemist, was sold to the husband for the use of the wife (plaintiffs). It proved most injurious:—*Held*, that inasmuch as there was a duty on the part of defts., as the compounder and seller of the hairwash, towards the wife, for whose use he knew it was purchased by the husband, to use due and reasonable skill and care in compounding and selling it, and damage had arisen to her, not remotely, but directly, by reason of a breach of that duty on the defendant's part, the action was maintainable by the plaintiffs jointly.—*George and Wife v. Skivington*, 21 L. T. N. S. 495; 39 L. J. Ex. 8.

TRADE MARK—*Sale of business and good will by assignees of trader—Right to name.*—In substance there is no distinction between the sale of a business and goodwill by a trader himself, and a sale by his assignees in bankruptcy. Therefore, on sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh business after his discharge, to use the trade marks of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business.

In such a case, it is no objection to the purchaser coming for the assistance of the Court, that he has continued to use the name of the old business which he found there.—[Note for Reference: *Churton v. Douglas*, 28 L. J. Ch. 841; *Johns*, 174.]—*Hudson v. Osborne*, 39 L. J. Ch. 79; (*James V. C.*)

COVENANT IN RESTRAINT OF TRADE—*Restrictive covenant by assignor against carrying on business in Europe so as to interfere with assignees.*—All restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties legally dealing with some subject matter of contract. Public policy requires, on the one hand, that a man should not be at liberty by any contract to deprive himself or the state of his labour and skill, but on the other hand, that a man having a commodity to sell should be permitted to sell it most advantageously by precluding himself by any not unreasonable agreement from entering into competition with the purchaser. Upon sale to plts. of certain patents for the manufacture of an article of commerce, the vendors agreed with plaintiffs not to carry on or allow to be carried on in any part of Europe any manufacture or sale of productions similar to those which were the subject of the patents, and not to communicate to any person the processes of such manufacture so as to interfere with the exclusive enjoyment by plts. of the benefits purchased:—*Held*, by James, V.C., that this was a valid covenant capable of being enforced.—*Leather Cloth Co. v. Lonsdale*, 39 L.J. Ch. 86.

FACTORY—*Slate quarry*—*Meaning of term "premises."*—A slate quarry occupying with its accessories a large tract of land, unenclosed and approachable by no definite road or entrance, and furnished with covered sheds to which the rough blocks of material when raised are conveyed and there converted by a manufacturing process into slates, flags, and other saleable articles, is not within the meaning of the term "premises" in the 30 and 31 Vict., c. 103, s. 3, sub-section 7.—*Kent v. Astley*, Q.B., 39 L.J. Mag. Ca. 3.

PRINCIPAL AND AGENT—*Conflicting instructions*—*Insurance*—*Discount*—*Custom of merchants.*—The London agent (who was also a member) of a firm who were commissioned to sell goods on behalf of the local government of a Spanish colony, was held to be justified in refusing to give them up to the Spanish Consul-General in England till he had communicated, through his immediate principals, with the local government. An agent who has the business taken out of his hands before completion is, by the custom of merchants, entitled to half the commission which he would have earned by completing it. The 10 per cent. discount usually allowed by insurance companies on punctual payment of the premiums belongs, in the absence of agreement to the contrary, not to the insurance agent, but to his principal.—*Queen of Spain v. Parr*, 39 L.J. Ch. 73.

BILL OF EXCHANGE—*Notice of dishonour.*—The holder of a bill of exchange, which was dishonoured on Friday, the 17th Sept., gave notice to his immediate indorser on Saturday, the 18th. He did not then know the address of the prior indorser (who was also the drawer of the bill); but after ascertaining the address, he posted a notice to him on the evening of Saturday, 18th, but so late, that the latter could not and did not receive it till Monday, 20th. All parties resided in London; and if the last mentioned notice had been posted before 6 p.m. on the 18th, the drawer would have received it the same evening:—*Held*, that the drawer could not, under the circumstances, set up as a defence to an action by the holder of the bill, that he had not received due notice of dishonour; and that the verdict which the jury found for the plaintiff ought not to be disturbed.—*Gladwell v. Turner*, 39 L.J. Ex. 31.

THE

JOURNAL OF JURISPRUDENCE.

A TRANSLATION OF THE TITLE OF THE PANDECTS
AD LEGEM AQUILIAM—(IX. 2).

[We give a translation of this important title of the Roman Law, chiefly for the purpose of illustrating the close analogies which exist between that system of jurisprudence and our own, and of showing the advantage to the student of familiarising himself with the simple and clear conceptions of the ancient jurists. As the Corpus Juris ought to be in the hands of every lawyer, we have thought it unnecessary to print the Latin text alongside of the translation; but we desire the translation to be regarded merely as an aid to the study of the original.]

SUMMARY.

By the Lex Aquilia—

Inst. 4, 3; D. 9, 2; C. 3, 35.

as extended—

s. 16, I. h. t.; l. 27, s. 19, 21; l. 30, s. 2; l. 33, s. 1, D. h. t.
every one guilty of a culpable, and therefore illegal, act—

l. 4, pr., 5 pr., 29, s. 3; l. 44, 49, s. 1, D. h. t.

being a positive act—

l. 33, s. 2, D. (7, 1); l. 30, s. 3, D. h. t.; cf. l. 4, 5 pr.; l. 27, s. 9;

l. 29, s. 1; l. 31, l. 49, s. 1, ejusd. tit.

whether of evil design or only from the want of due care—

l. 5, s. 1-3; l. 6, l. 8, s. 1; l. 10, l. 44, D. h. t.

whereby he causes an injury to, or the destruction of, a thing, or produces the like result as if it were destroyed—

l. 7, s. 1, *et sq.*; l. 27, s. 5, *et sq.*, h. t.

or wounds a freeman—

l. 5, s. 3; l. 7 pr., s. 4; l. 13 pr., h. t.

is bound to make good the damage so occasioned (*damnum injuria datum*);

l. 21, s. 2; l. 23, s. 6; l. 29, s. 3; l. 33, 37, s. 1, h. t.

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The action for this is the *actio legis Aquiliæ, directa* or *utilis*, and *in factum actio accommodata legi Aquiliæ*;

l. 11, D. (19, 5); l. 9, s. 2, 3; l. 29, s. 5; l. 33, s. 1; l. 53, D. h. t.; l. 16, I., h. t.

It was competent, not simply to the owner—

l. 2 pr.; l. 11, s. 6; l. 27, s. 5, h. t.; cf. l. 19, 20.

but even against him, to any other person holding a real right in the subject—

l. 11, s. 8, 10; l. 12, l. 17, h. t.

and respectively to the individual wounded—

l. 13 pr., h. t.

or the person holding him in his power.

l. 7 pr., s. 4, h. t.

The compensation payable was double the value, if the injury were denied;—

l. 2, s. 1; l. 23, s. 10, h. t.; l. 4, Cod. h. t.

and the action partook of a penal nature, from the provision that the value might be assessed, in the case of slaves or four-footed animals killed, at their greatest worth during any part of the preceding year, and, in other cases, during the preceding thirty days;

l. 11, s. 2, 4, D. h. t.; l. 2 pr., s. 2; l. 21, 22, 23, s. 3; l. 27, s. 5; l. 29, s. 8, D. h. t.

The liability descends, subject to certain qualifications, to the heir;

l. 23, s. 8, D. h. t.

and where there are more wrong-doers than one they were jointly responsible.

l. 11, s. 2, h. t.

In bodily injuries, the claim included only patrimonial loss, such as, cost of medical attendance and loss of labour.

l. 7 pr., h. t.; l. 7, D. *de his qui effud.* (9, 3).*

* The subject of this title is thus defined by MÜHLENBRUCH, *DOCTRINA PANDECTARUM*, ii., s. 352:—"Omnino latæ et levis culpæ distinctio ad ea tantum pertinet officia, quæ vel ex obligationis vinculo vel propter alienarum rerum possessionem homines oportet subire. A quibus longe differt illud velut commune omnium hominum officium, cavere, ne eo injuriæ genere, quæ lege Aquilia vindicatur, rebus alienis inferant damnum; quo quidem quamvis levi culpâ facto ad *damnum injuria datum* resarciendum omnes tenentur (v. l. 44, l. 30, s. 3, *infra*, etc.). Hæc igitur injuria, cum *faciendo* semper admittitur (v. l. 27, s. 9, *infra*), præ caeteris *culpæ* nomine appellari solet, reliqua vero omnis *negligentiæ*, ideo quod *diligentiam* debitam omitiendo contrahitur; neque attinet præterea culpæ in *faciendo* et in non *faciendo* discrimen statuere, cum similiter negligentes sint, et qui omitant quod facere eos oportet, et qui *faciendo* contra suum officium aliquid committant." It may be convenient to refer to the texts in which some of the leading principles of this doctrine are illustrated. In order to ground a right of action under the Aquilian law,—

1. There must be actual pecuniary loss (*damnum*), l. 27, s. 28; l. 41, l. 54, and compare l. 40, l. 45, s. 5.

2. Caused by the *act* of the defendant. l. 7, s. 6; l. 7 pr., l. 9, s. 1; l. 9, s. 2; l. 11, s. 1; l. 7, s. 3; l. 11, s. 5; l. 9, s. 2; l. 7, s. 6; l. 29, s. 5; l. 49, l. 53, l. 57, l. 27, l. 27, s. 10. But, in many cases where damage is not done by a personal act of the defendant, a remedy is provided by the praetor's giving an *actio in factum* or *actio utilis* under this law; an equitable extension of its provisions. See the laws above cited, and l. 5, l. 6, Cod. h. t. (3, 35); l. 27, s. 34; l. 29, s. 2, *infra*.

3. Which act must be done wrongfully (*injuria*), l. 3, l. 5, s. 1. This element of *wrong* will be present (a) if one does not foresee and guard against what he ought to

I. *Ulpian, l. xviii, ad Ed.*—The *lex Aquilia* altered all the previous laws which treated of damage wrongfully done, both the laws of the Twelve Tables and others; which laws it is not now necessary to repeat. § 1. The *lex Aquilia* is a *plebiscitum*, which Acquilus the tribune proposed to the plebeians.*

II. *Caius, l. vii, ad Ed. prov.*—By the first chapter of the *lex Aquilia* it is provided: HE WHO SHALL HAVE WRONGFULLY KILLED THE MALE OR FEMALE SLAVE OF ANOTHER, OR THE QUADRUPED OR CATTLE, SHALL BE CONDEMNED TO PAY TO THE OWNER THE GREATEST MONEY VALUE WHICH IT† POSSESSED DURING THE YEAR.—§ 1. And it is afterwards provided that there shall be an action for twice the value against him who denies the fact.—§ 2. It appears, therefore, that it places quadrupeds, which are reckoned among cattle, and are kept in herds—such as sheep, goats, oxen, horses, mules, asses—in the same category with our slaves.‡ But, it is asked, are swine included under the term cattle? And Labeo rightly holds that they are. But the dog is not reckoned among cattle. Much less are wild beasts—such as lions, bears, panthers. But elephants and camels are as it were intermediate; for they do the work of beasts of burden, though they have the nature of wild beasts, and hence they are comprised under this first chapter. ||

III. *Ulp., l. xviii, ad Ed.*—If a male or female slave shall have been wrongfully killed, the *lex Aquilia* applies. *Wrongfully* is well added; for it is not enough that he be killed, but it must be done wrongfully.§

IV. *Caius, l. vii, ad Ed. prov.*—Therefore, if I slay your slave while lying in wait for me to rob me, I shall be free; for the law of nature permits me to defend myself against danger. ¶—§ 1. The law of the

have foreseen, l. 30, s. 3; l. 31, l. 11, l. 28; even if the delict should have been committed by others for whom he is responsible, l. 27, s. 11. (b) If one be engaged in an illegal business at the time, l. 29, l. 9, s. 4; l. 10. (c) If one who undertakes any operation should not have the requisite skill, or strength, or other qualities, l. 7, s. 8; l. 8, l. 27, s. 29; l. 7, s. 2; l. 29, s. 4; l. 27, s. 33; l. 8, s. 1; l. 52, s. 2. (d) If one be guilty of excess in a lawful act—as if a master exceed the due measure of severity in correcting a pupil, l. 5, s. 3; l. 6, l. 7. Hence, the action does not apply (a) to accidents, l. 52, s. 4; l. 57: (b) nor against persons void of reason, l. 5, s. 2: (c) nor to acts done in the exercise of a right, l. 45, s. 4; l. 4, s. 1; l. 5, l. 52, s. 1; l. 30, l. 7, s. 4; l. 49, s. 1; l. 29, s. 3; l. 39, l. 29, s. 1.

The way in which the damage is to be assessed is laid down in l. 21, l. 29, s. 8, which are explained in l. 23, s. 3, s. 5. The whole interest of the plaintiff is calculated "*quanti interfuit non esse occisum*," l. 21, s. 2; l. 23, l. 23, l. 37, s. 1; provided that such interest has existed within a year or within thirty days, as the case may be, l. 21, s. 1; l. 23, s. 6, 7; l. 55; and provided that it be not uncertain, l. 29, s. 3; l. 23, s. 2; nor fanciful and imaginary (*pretium affectionis*), l. 33.

* At the time of their Secession, says Theophilus, *ad s. 15 Inst. A. t.*; probably the Secession to the Janiculum, A.U.C., 467 (B.C. 287).

† V. *infra* l. 21, s. 2 h. t.

‡ Cf. l. 38, s. 1 & 2, *D. de aed. ed.*; l. 27, s. 5 h. t.; L. Seneca, Ep. 47, "*Alia interim crudelia et inhumana praetereo, quod nec tanquam hominibus quidem sed tanquam jumentis abutimur*."—See MERILL. *Obs.* II. 35.

|| L. 38, s. 4, *de aed. ed.* (21. 1); Brisson, *de Verb. Sig. v. jumentum*; *Wright v. Pearson*, 38 L. J. Q. B. 312, *supra* p. 587.

§ *Injuria = nullo jure*; s. 2, *Inst. A. t.* (4, 3). "*Nemo damnum facit, nisi qui id fecit quod facere jus non habet*."—L. 151 *D. de R. J.* (50. 17.)

¶ Other instances of damage done *jure*: l. 30 h. t., l. 45, s. 4.

Twelve Tables* allows the killing of a thief caught in the act by night, provided the fact be testified by a clamour; but it suffers one caught by day to be slain only if he defend himself with a weapon, and in this case also, the fact must be proclaimed with a loud cry.†

V. *Ulp., l. xviii., ad Ed.*—If one should kill another who attacks him with a weapon, he will not be held to have killed him wrongfully, and if one shall slay a thief under the fear of death, there is no doubt that he is not liable under the *lex Aquilia*. But if, being able to apprehend him, he preferred to kill him, it seems that he should be held to have done it wrongfully; and therefore he will be liable under the *lex Cornelia*.‡—§ 1. Here we must not take the word “wrongfully” in the sense of the *Actio injuriarum*, to imply outrage or affront, but what has been done without right, and is contrary to right, that is, if one commits a fault (*culpa*) in the killing; and thus there is sometimes a concurrence of the two actions, the action on the *lex Aquilia* and the *Actio injuriarum*; but there will be two valuations, one of damage and the other of the outrage or affront. Therefore the word “wrongfully” here applies to damage done culpably (recklessly), even by one who did not wish to injure.—§ 2. And hence we are led to inquire: whether a madman who has done damage is liable to the action of the *lex Aquilia*? This Pegasus denied; for what fault can be ascribed to him when he is out of his mind? And this is right. Therefore the action of the Aquilian law will not lie, just as it does not lie when a quadruped has done the damage or a beam has fallen. If an infant has done the damage, the same must be said. But if a pupil (*impubes*) does it, Labeo says the Aquilian action lies against him, because he is liable to the *actio furti*; and this I think to be true, if he is capable of doing wrong.—§ 3. If a master tradesman or teacher wound or kill a slave whom he is training, is he liable under the Aquilian law as having done damage wrongfully? Julianus writes: that a man is liable under the Aquilian law who has blinded a pupil in school. Much more must it be said if he has killed him. He puts the following case. A shoemaker, he says, strikes on the head with his last, a freeborn youth, a *filius familias*, who is learning his trade, and who

* “Si nox furtum factum sit, si im aliquis occisit, jure caesus esto,” MACROB., Sat. I. 4. Cf. EXOD. xxii. 2. A law of Solon cited by DEMOSTH. *contra Timocr.*, p. 735 f., PLATO *de Legg.* IX. GEOR. *de J. Belli et Pac.*, I. 3, 2, 2; II. 1, 12. NOODT *Prob. jur.*, I. 9, *Ad leg. Aq.* c. 5.

† Pleas and cases in illustration of this doctrine are noted in Bullen and Leake’s *Precedents in Pleading*, p. 792, 793; *Macfarlane v. Young*, 3 Mur. 408. If a man shoot a burglar, the question for the jury is whether there was necessity for taking away life, i.e., necessity as the facts appeared to the prisoner at the time—“Whether he was so placed as to be justifiably alarmed to the extent of entitling him to fire.”—Per Lord Moncrieff in Lane’s case, cited by Macdonald, *Crim. Law*, p. 152.

‡ Noodt maintains that this should be *Aquilia. li. cc.*

§ “*Injuriae capax*,” i.e., *proximus pubertati*; the phrases “*doli capax*” and “*proximus pubertati*” being used in the Roman law as synonymous. As to this and the liability for delicts of pupils and minors in general, see SAVIGNY’S *SYSTEM*, vol. iii., pp. 42–44.—L. 111 *D. de R. J.* (50, 17). Lunatics are also exempt by law of Scotland, *Dick v. Steel. Elch. Battery*, 1. As to pupils, see *Bryson v. Somerville*, M. 2906; *Somerville v. Hamilton*, M. 2905; *Smith on Reparation* 22; and in regard to other cases in the section, see *McKenzie v. Dickson*, 11 D. 4, and *Smith*, p. 50.

has done negligently what he had taught him, so severely as to put out his eye. Julianus says that the *actio injuriarum* is not competent, because he did not strike with the purpose of doing injury, but of admonishing and teaching. He doubts whether an action *ex locato* will not lie, because only a moderate degree of chastisement is allowed to a teacher. But that he may be sued under the *lex Aquilia*, I do not doubt.*

VI. *Paulus*, l. xxii., *ad Sab.*—For the excessive cruelty of the preceptor is reckoned a fault.

VII. *Ulpianus*, l. xviii., *ad Ed.*—By which action, he says, the father will obtain the amount by which his gains from the labour of his son are diminished in consequence of the injury to his eye, and the expense which he has incurred for medical attendance.

§ 1. The *killing* may be by the sword, or by a club, or other weapon, or with the hands, if he has strangled him, or struck him with a stone, or with his head, or in whatever way.

§ 2. Also, if a person too heavily loaded has let his burden fall and killed a slave, the Aquilian law applies; for it was in his own discretion not to load himself so heavily.† For Pegasus also says that if any one should fall and knock over another person's slave with his burden, he is liable to the Aquilian law only if he has loaded himself more heavily than was reasonable, or passed carelessly over a slippery road.

§ 3. Further, if any one has done damage from being pushed by another,‡ Proculus writes that neither he who pushed is liable, because he did no damage, nor he who was pushed, because he did no damage wrongfully; so that an action on the case (*in fuctum*) will be given against him who pushed.||

§ 4. If one shall kill another in wrestling in the *pancratium*, or in a fight with the fists, at least if it should happen in a public contest, the *lex Aquilia* does not apply, because the damage is not done from any bad motive (*non injuriæ gratia*), but for the sake of fame and manhood. But this does not hold in the case of a slave, because free-men are wont to engage in such contests; but it extends to a *filius familias* who is wounded. Certainly the Aquilian action will lie, if the wounded man has been retiring from the combat, or if a slave is killed not in a (public) contest, unless this should have been done where

* This passage is explained by ULPIAN, l. 13, s. 4, *loc. cond* (19, 2). The singular use of "*dubitat*," "*non dubio*," is noticed by NOODT, *Lib. Sing. ad l. 4 q. c. 6*.

† Cf. l. 8, s. 1 h. t.

‡ Cf. l. 52, s. 2 h. t.

|| The modern rule is that the damage to be recovered must be the *natural* and *proximate* consequence of the act complained of: but this does not mean that the act must be the sole and exclusive cause—only that it is the *causa causans*, that which puts in motion, and sets agoing the particular agency or series of agencies which produced the loss. Thus in the famous squib case—defendant threw a squib into the market house which fell on the stall of a gingerbread seller; he, to save himself, threw it on another stall; keeper of stall No. 2 also threw it off, and squib striking plaintiff put out his eye; defendant held liable for loss of plaintiff's eye.—*Scott v. Shepherd*, W. Black, 892; Smith L.C. 417. See many after examples in Smith on *Reparation*, pp. 80–88; 2 Smith L.C. 496 sqq.

the master is his backer;* in that case the Aquilian law does not apply.

§ 5. Even if one should slightly strike an ailing slave, and he should die, Labeo correctly says that he is liable to the Aquilian action, because to different bodies different things are deadly.†

§ 6. But Celsus says that there is a great difference between killing a man, and giving the occasion of death; so that one who has only given occasion of death is subject not to the Aquilian, but to an action *in factum*.‡

§ 7. But Celsus says—that, if a man has thrown another from a bridge, he comes under the Aquilian law, whether the latter perish by the blow, or be at once submerged, or perish exhausted by the force of the stream, just in the same way as if he had struck a boy with a stone.

§ 8. Proculus says that if a surgeon perform an operation on a slave unskillfully, either an action *ex locato* or *ex lege Aquilia* is competent.‖

VIII. *Caius*, l. vii., *ad Ed. prov.*—The same is the law if he have used a drug improperly.§ Also he who has performed the operation well, and has neglected to attend to the cure, will not be free, but is held guilty of a fault.

§ 1. It is commonly held that a muleteer who, from want of skill, cannot restrain the impetuosity of his mules, if they run over another person's slave, is guilty of a fault. The same will be said if he could not hold them in on account of weakness; for it does not seem inequitable to regard weakness as a fault, because no one ought to attempt that in which he either knows, or ought to know, that his weakness will be dangerous to another. The same is the law as to one who cannot, for want of skill or of strength, manage the horse on which he rides.

IX. *Ulpianus*, l. xviii., *ad Ed.*—Likewise, if a midwife administer a drug, and the woman dies in consequence, Labeo makes this distinction, that if she gave it with her own hands she shall be held to have killed her; but if she gave it so that the woman took it herself, that an action *in factum* will lie. Which opinion is correct; for she gave the occasion of death, rather than killed her.

§ 1. If one has administered a medicine to any one by force or persuasion, either through the mouth or by a clyster, or has anointed him with a poisonous unguent, he is liable under the *lex Aquilia*, just as the midwife.

* Cf. l. 203, *D. de R. J.* (50, 17). *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* See l. 11 pr., l. 9, s. 4; l. 31, fin. h. t.

† Cf. l. 24, s. 5, *D. de damno inf.* (39, 2).

‡ See l. 51, pr. h. t. There was no such distinction by the *Lex Cornelia*, l. 15 *D. ad l. Cor.* (48, 8). The direct action under the Aquilian law related, by the terms of the law, only to deeds done *manu vel corpore* of the defendant.

‖ Cf. l. 182, *D. de R. J.* (50, 17). "*Imperitia culpæ adnumeratur.*" and l. 9, s. 5, 13, s. 5, *D. loc. cond.* (19, 2), l. 27, s. 29, h. t., s. 6, 7, *Inst. h. t.* (4, 3). *HOR. EP. II.* 114 *PRÆ. SAT. V.* 96 sqq., where the Stoic doctrine is laid down pronouncing all actions immoral which are done by the ignorant and incompetent. "*Nec liceat facere id, quod quis vitabit agendo.*"

§ The mixture of a poison by mistake for the drug ordered, subjects the party in damages (*Dalziel v. Osborne*, 14th Nov., 1857, 20 D. 55). The cases in which the maxim *spondet peritiam artis* is enforced, are of daily occurrence.

§ 2. Neratius says, that if one has killed a man by famine, he is liable to an action *in factum*.

§ 3. If, by frightening the horse, you cause my slave to be thrown into a river while riding, and the man perishes, Ofilius writes that an action *in factum* will lie, just as if my slave were led into an ambush by one and killed by another.*

§ 4. But there is also room for the action on the Aquilian law, if the slave be killed by persons playing with javelins.† But if, when others are playing with javelins in a field, the slave should pass through that place, there is no room for the Aquilian action, because he ought not to have gone unseasonably through the practising ground. But if one purposely threw a javelin at him, the *actio legis Aquiliæ* will lie.

X. *Paulus, l. xxii., ad. Ed.*—For a dangerous sport is also a fault.

THE STATUTES 33 & 34 VICTORIÆ

(Continued.)

CAP. 61. "THE LIFE ASSURANCE COMPANIES ACT, 1870."

THIS statute applies to all companies, i.e., "any person or persons corporate or unincorporate," not being registered under the Friendly Societies Acts, who issue or are liable under life policies, or who grant annuities upon human life, within the United Kingdom (s. 2). Every company in future established, or commencing to carry on business in the United Kingdom, must deposit £20,000 with the Accountant General of the Court of Chancery, to be invested by him and returned as soon as the company's life assurance fund, accumulated out of the premiums, shall have amounted to £40,000. The company receives the income of the invested sum (s. 3): Clause 4 provides that companies established after the passing of the Act are to keep their life business separate from any other business they may undertake, and to form, from life assurance and annuity receipts, a life assurance fund, which shall be absolutely the security of the life-policy and annuity holders, and shall not be liable for other contracts of the company. Future contracts with existing proprietary companies, whose constitution contains no provision for such separation, are apparently to be subject to a similar exemption of the life assurance fund from liabilities arising out of other business than life insurance. This part of s. 4 is not very clearly expressed; and it is nowhere explicitly declared that existing companies shall form out of future life assurance receipts a life assurance fund.

The most important change introduced by the Act is the compulsory publication of insurance companies' accounts annually, and at more distant intervals. The provisions on this point apply to all life assurance companies. By clause 5, each company is required to make

* See l. 27, s. 34, h. t.

† Cf. s. 3, 4, *Inst. h. t.* (4, 3); l. 11, *pr. h. t.*

up a revenue account and a balance sheet in a prescribed form at the close of each financial year—that date to be the time when a company strikes its annual balance, or the 31st of December, where no such balance is now struck. Different forms are prescribed for companies which have only life assurance business, and those who have also other business. Each company (s. 7) is periodically to “cause an investigation to be made into its financial condition by an actuary, and shall cause an abstract of the report of such actuary to be made” in a prescribed form. Such investigation is to be made once in every five years in the case of a company established after the passing of the Act, and in the case of companies previously established once every ten years; “or at such shorter intervals as may be prescribed “by the instrument constituting the company, or by its regulations or bye-laws.” That is to say, the investigation is to be quinquennial, or once every ten years, according as a company is established after or before the passing of the Act; but if the private arrangements of each company prescribe more frequent periodical investigations, these may be substituted for the investigations rendered compulsory by the Bill. Each company within nine months after the date of each such investigation (s. 8) must prepare a statement of its life assurance and annuity business in a prescribed form. Such a statement must also be prepared before 31st December, 1872, unless when the next investigation is to take place in 1873. When a company makes an annual investigation, such a statement need only be made once in three years. There are thus three things made compulsory by the Act—the preparation (1) of annual accounts in a prescribed form, (2) of the abstract in a prescribed form of the results of a quinquennial actuarial investigation, and (3) of a “statement of business” to accompany each abstract of an actuarial investigation or every third investigation, if it is annual. By s. 10, these various statements or abstracts are to be signed by the chairman and two directors of each company, the principal officer managing the life assurance business and the managing director if there is one; and the original, with three printed copies, is to be deposited with the Board of Trade within nine months after the dates at which they are ordered to be prepared. By s. 11, a printed copy of each deposited statement, abstract, or other document by this Act required to be printed, which includes all the documents we have described, “shall be forwarded by the company, by post or otherwise, on application, to every shareholder and policy-holder of the company.” By s. 24 the Board of Trade is ordered to lay annually before Parliament the “statements and abstracts of reports” deposited with them under this Act during the preceding year; and the correctness of the information is secured by ss. 18 and 19, the first of which imposes a fine of £50 per day on any company which delays depositing the documents required with the Board of Trade, and authorises the winding up of the company if the default is continued for three months; and the second of which runs:—“If any statement, abstract, or other docu-

ment required by this Act is false in any particular to the knowledge of any person who signs the same, such person shall be liable on conviction thereof on indictment to fine and imprisonment, or on summary convictions thereof, to a penalty not exceeding fifty pounds." These provisions seem to give all the publicity which can legitimately be required.

Among the miscellaneous provisions, s. 12 provides, in the case of every company not subject to Act, 1862, or the Companies' Clauses Act, 1845, s. 10, for the keeping of a register of shareholders accessible to every shareholder and policyholder; and s. 13 requires a copy of the deed of settlement of every company not registered under the Companies' Act 1862, to be furnished on application to every shareholder and policyholder.

Sections 14 and 15 regulate amalgamations. Where an amalgamation or transfer of business is intended, the directors may apply to the Court by petition to sanction the arrangement, with notice in the *Gazette*; and, after hearing any objections, the Court may confirm the same. But before such application, a full statement of the terms of the proposed arrangement and of the accounts and actuarial reports is to be forwarded to each policyholder of both companies, and the agreement or deed is to be open to inspection of policyholders and shareholders at the office of the company for fifteen days after issuing such abstracts. No amalgamation or transfer is to be sanctioned where policyholders representing one-tenth or more of the total amount assured in the company to be amalgamated or transferred dissent therefrom. In case of amalgamation or transfer, the combined company is, within ten days thereafter, to deposit with the Board of Trade certified copies of statements of the assets and liabilities of the companies concerned, and the terms thereof, and a copy of the deed or agreement, and a declaration under the hands of the chairman and manager of each company, of their belief that every payment to be made is correctly set forth, and that no others have been or are to be made.

Documents required by the Act, or certified copies, are to be filed by the registrar, or other officer appointed by the Board of Trade, and when so deposited they, or copies certified by the officer of the Board, are to be admissible in evidence. Section 18 imposes penalties for default in complying with the Act, and s. 19 for falsifying any document or statement required by the Act. Penalties are recovered as provided by the Companies' Act, 1862 (s. 20); i.e., by s. 65 of that Act, by summary prosecution in Scotland before two or more justices or the Sheriff, in the manner directed by 17 and 18 Vict., c. 104 (Merchant Shipping Act), as regards offences not described as felonies or misdemeanours.

The Court of Session, in either Division, may order a company to be wound-up on the application of one or more policyholders or shareholders on proof that it is insolvent, and in determining this the Court is to take into account (contrary to the judgment of James, V.C., *in re*

European Life Assurance Co., 39 L.J. Ch. 324) its contingent or prospective liability under policies, annuities, and other existing contracts. But no petition is to be heard until security is given for costs, and until a *prima facie* case is established to the satisfaction of the Judge. If there is capital uncalled up sufficient to meet liabilities, the Court is to suspend proceedings to enable such necessary capital to be called up (s. 21). The Court is empowered, in the case of an insolvent company, to reduce the amount of the contracts of the company on such terms as the Court may think just, instead of making a winding-up order (s. 22).

CAP. 62. "THE FACTORY AND WORKSHOP ACT, 1870,"

Extends and amends the Factory Acts' Extension Act, 1867, along with which it is to be read. From 1st January, 1872, that Act extends to all print works and bleaching works, subject to certain modifications contained in the schedules to the Acts. Other modifications are made with regard to the manufacture of preserves from fruit and the curing of fish.

CAP. 63. "THE WAGES ARRESTMENT LIMITATION (SCOTLAND) ACT."

From 1st January next, "the wages of all labourers, farm servants, manufacturers, artificers, and work-people," cease to be liable to arrestment for debts contracted subsequent to the passing of the Act (s. 1), except as to any surplus of wages earned above 20s. a-week, but even then the expenses of such arrestment are not chargeable against the debtor unless a larger sum than the amount of said expenses are recovered under the arrestment (s. 2). Arrestments of wages for debts contracted prior to the passing of the Act, must have that fact stated on the face of them or indorsed; and this may be done by a memorandum by the officer who executes the arrestment (s. 3). The Act does not apply to arrestments in virtue of decrees for alimentary allowances or payments, or for rates or taxes; but after 1st January, 1871, arrestments for such debts must set forth the nature of the debt for which they are used; otherwise they will be ineffectual (s. 4).

We have not room in the present number for observation on this important Act. It needs only to be remarked at present that a shorter and more thorough Act has been passed for England in the late session (cap. 30), which briefly provides that "no order for the attachment of the wages of any servant, labourer, or workman, shall be made by the Judge of any Court of Record or Inferior Judge."

CAP. 97. "THE STAMP ACT, 1870."

We continue the *resume* provided by the *Shipping Gazette*:—

"The charges under the head of Lease or Tack have all been brought together under one head, and the one penny duty on short lettings may be denoted by an adhesive stamp. On leases or tacks, for any term less than a year, of any dwelling-house or tenement, or rooms, at a rent not exceeding £10 per annum, the one penny duty is to apply instead of on an estimated rent of 3s 6d per week,

as at present. This change is slightly in favour of the public. The duty, however, on the letting of furnished houses or apartments, where the rent for one year exceeds £25, is 2s 6d. The charge in respect of rent upon leases for years is made to depend, not, as under the existing law, upon the yearly rent, which has been held to mean the rent reserved during every year of the term, but upon the average yearly rent during the whole term. The existing enactment, by which an agreement for a lease for a period not exceeding seven years is chargeable with duty as an actual lease, has been extended to agreements for periods not exceeding thirty-five years. Leases made in consideration of a fine, with a yearly rent under £20, are now chargeable only with duty in respect of the fine. In the future they are to be in respect of the rent also. The scale of duties has been altered on leases and agreements, and those who take or let houses, apartments, or lands, will have to consult the new Act, on and after the 1st January next, to see that the law is complied with.

"The penny duty on letters of allotment and of renunciation, and of scrip and scrip certificates, has been consolidated, and extended to municipal bodies and corporations. A practice having grown up of naming two or three persons to vote, the word 'one,' immediately preceding the word 'person,' has been added to the letter or power of attorney or commission, mandate, or other instrument made for the purpose of appointing or authorising a person to vote at a meeting. Those acquainted with proceedings of public companies will understand the importance of this change, for there is scarcely a voting paper which does not provide for the absence of the party in whose favour it is filled up. These proxy papers have to carry a penny stamp; but, under the new Act, if a second or third person is named in them, they will be illegal. These papers are available for a meeting on any specified day, or an adjournment thereof, and may be denoted by an adhesive stamp. Every person who makes, executes, votes, or attempts to vote, by any such paper, unless the same is duly stamped, is to forfeit the sum of £50. After execution, if an adhesive stamp is not used by the person executing the instrument, these papers cannot be impressed with the penny stamp. As a voting paper is to be 'for the sole purpose of appointing or authorising any one person to vote,' it is evident that if a paper has been made out to give A the right of proxy, and it is intended to provide for his enforced absence, B and C, or any other number, must each have a separate voting paper bearing the penny stamp. Looking at the immense number of proxy papers, this change in the law will create some confusion until the enactment becomes well known. With respect to powers of attorney for other purposes there is no radical change."

With regard to this class of documents a summary in the *Scotsman* says:—

"Hitherto stamped mandates have been very much restricted to public companies, and have been evaded by private or semi-private societies. This arose from railway, joint-stock, and other companies being specially named in the long enumeration of societies required to use them. Now, however, the plain and easily understood rule is laid down that, wherever one person votes for another person, or body of persons, as a delegate or proxy, the authority so to vote must be stamped. If it is to vote at one meeting the power exercised by one person must have a 1d stamp. If for a permanent purpose, a 10s stamp is required. The charge in both cases is very moderate, but the penalty for default is very heavy. Having explained that whosoever votes by proxy can do so upon a penny certified authority, it should be made equally plain that whosoever 'makes, or executes, or votes, or attempts to vote, under or by means of any such letter, or power of attorney, or voting-paper not being duly stamped, shall forfeit the sum of £50.' The penny proxy covers quite a multitude of cases. The provision relating to it is in these terms:— 'For the sole purpose of appointing or authorising any one person to vote as a proxy at any one meeting at which votes may be given by proxy.' If any person now says he acted in error, such plea will not be sustained. The more permanent form of mandate comes under the name of

'commission,' and where there are a series of actions and transactions the term is 'factory.' A commissioner or delegate to a public board requires a 10s stamp to cover and protect continuous acting and voting. So likewise the factor upon an estate. But this factory may be granted in a modified form. After the 1d mandate comes the 1s instrument. This must be held and be produced by any petty officer, seaman, marine, or soldier serving as a marine, or by the executor or administrators of any such person, for receiving prize money or wages. Such an instrument must also be produced for the receipt of the dividends or interest of any stock where power is given for the receipt of one payment only. The 5s power is required when more than one payment is to be received. It must also be produced for the receipt of any sum of money, or any bill of exchange or any promissory note for any sum of money, not exceeding £20, or any periodical payments not exceeding the annual sum of £10. The 5s duty is not a periodical but a single payment. The third case to which it applies is the sale, transfer, or acceptance of Government or Parliamentary stocks or funds, and where the value does not exceed £20. When the authority is to carry out any other or more responsible duties than those referred to above, the charge is fixed at 10s overall. There is one important regulation affecting powers of attorney, mandates, commissions, factories, and such like instruments. If discovered to be wrong, they cannot by any means be rectified. The votes passing on them, if not stamped, are void; and 'no such letter, or power of attorney, or voting-papers shall, on any pretence whatever, be stamped after the execution thereof by any person.' There are some cases of exemption from the use of stamped mandates. These may be unstamped at meetings under sequestration, or under the Poor-law."

The Shipping Gazette continues:—

"The £5 duty on letters of marque and reprisal have been re-introduced, though her Majesty never received any revenue from this source. Mortgages, bonds, debentures, covenants, warrants of attorney to confess and enter up judgment, and foreign securities of any kind, are all scheduled together as regards the payment of duty; and eleven clauses in the Act are devoted to their interpretation, penalties, and modes of execution. With respect to the term 'foreign security' used in the Act, it includes securities of every kind for the payment of money (except bills of exchange and promissory notes) made or issued in the United Kingdom, on which interest is payable or is assigned or negotiated; and every person in the United Kingdom who makes, issues, assigns, transfers, negotiates, or pays any interest upon any instrument of foreign security not being duly stamped, is to forfeit the sum of 20l. Policies of insurance are defined. Nothing in the Act applies to policies of sea insurance, except paragraph 2 in clause 117, which stands thus: 'A policy of sea insurance made or executed out of, but being in any manner enforceable within, the United Kingdom, is to be charged with duty under the 30 Vict., c. 23, and may be stamped at any time within two months after it has been first received in the United Kingdom on the payment of the duty only.'

"Under the 7 Will. IV., c. 32, stamp duties on mortgages by building societies were exempt from taxation; but, with the exception of mortgages by members to the societies for repayment of moneys, the duty is re-imposed. No alteration is made in relation to receipts given for or upon the payment of money amounting to £2 and upwards, so far as regards the duty. A receipt given without a stamp may be impressed within fourteen days on payment of £5; after fourteen days, but within one month, on a penalty of £10; but cannot be stamped, under any circumstances, after the latter period. In the schedule the exemptions given are numerous, and in a few cases make changes. In the 16 & 17 Vict., c. 59, receipts for money deposited in any bank are exempted, provided the same be not expressed to be received of or by the hands of any other than the person to whom the same is to be accounted for. In consequence of this exemption, receipts by bankers are framed so as not to define the name of any person by whom the payment is made, and in this way the duty is evaded. The new Act does away

with these blank receipts, and exempts 'receipts given for money deposited in any bank, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.'

"Among the exempted classes are officers and members of the army or navy, on account of wages or pensions. The insertion of words to include merchant seamen would have obviated any reference to this subject in the Merchant Shipping Code. In the Companies Act 1867, there is a provision for the issue of share warrants which may be passed from hand to hand by indorsement, and in consequence of their being no penalty against issuing these certificates unstamped, a great number, it is said, are in circulation without bearing the stamp. The manufacturers of these warrants will have to be more careful when the new Act comes into force, for the managing director, secretary, or principal officer will be liable to a penalty of £50."

CAP. 70. "THE GAS AND WATERWORKS FACILITIES ACT, 1870."

This Act facilitates the obtaining of powers for constructing and maintaining gas and waterworks, or to manufacture and supply gas or supply water in any district within which there is not an existing company, corporation, or person authorised by Act of Parliament to do so; for raising additional capital for such purposes; for the amalgamation of companies, or the making agreements between companies to supply a district jointly (s. 3). It is unnecessary to particularise the various provisions contained in the Act with regard to the provisional order which may be obtained from the Board of Trade. Such provisional orders may be obtained by town councils in burghs not subject to police commissioners, by police commissioners in other places, and by parochial boards, in any parish or part of a parish outwith the jurisdiction of a town council or police commissioners.

CAP. 71. "THE NATIONAL DEBT ACT, 1870."

This Act consolidates a variety of statutes relative to the national debt.

CAP. 72. "THE PEDLARS' ACT, 1870."

This Act consolidates the law relating to hawkers and pedlars, and comes into operation on the 1st January, 1871.

A pedlar is defined to be a person who, without any horse or beast bearing or drawing burden, travels and trades on foot, and goes from town to town, or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise, immediately to be delivered, or selling or offering for sale, his skill in handicraft (s. 3). This definition excludes itinerant traders who apply for orders only, as for books issued in numbers, and many of the tallymen also. A pedlar must take out a certificate for the police district in which he travels, under a penalty of 10s for the first and 20s for the second and subsequent offence (s. 4). The certificate is to be granted by the chief officer of police of the district in which the applicant resides, on such officer being satisfied that the pedlar is of good character. The license fee is to be sixpence. The certificate continues in force for one year,

and authorises the holder to act as a pedlar within such police district. Its effect may be extended, by indorsement, to other districts. A register of certificates is to be kept in each district; forms of application are to be kept at each police station; and the certificate is not to be assigned or borrowed, under a penalty not exceeding 20s (ss. 5-10). Forgery of a certificate, knowingly carrying a forged one, or misrepresentation in order to obtain one, is subject for a first offence to a penalty of 40s; for a subsequent offence to six months' imprisonment. Certificate is not to be granted to a person convicted of felony or any misdemeanor involving dishonesty. A record of a conviction of any offence under this Act is to be indorsed on the certificate (s. 14); and a Court before which a pedlar is convicted of any offence under this or any other Act may deprive him of his certificate (s. 16). An appeal lies against the refusal of a certificate to a Court having jurisdiction in the place (s. 15).

A pedlar is to produce his certificate on demand by any police constable or officer of police, or by any person to whom he offers goods for sale, or any person in whose private grounds he is found, under a penalty of 5s; and on refusal he may be by such person conveyed forthwith to a justice, but not to be detained longer than twelve hours before he is brought before a justice of peace (s. 17). Any constable or police officer may inspect a pedlar's pack (s. 18).

Licences granted before the Act comes into operation are to remain in force till the date at which it expires (s. 19).

Penalties may be recovered before justices in the manner directed by the Summary Procedure Act (s. 20).

It is provided by s. 22 that certificates shall not be required by (1) commercial travellers or other persons seeking orders for goods to or from persons who are dealers therein, and who buy to sell again; (2) sellers of vegetables, fish, fowl, or victuals; and (3) persons selling in any public mart, market, or fair legally established.

Forms of application, of certificates, and of endorsement are provided in schedules.

CAP. 78. "THE TRAMWAYS' ACT, 1870."

This Act, which does not extend to Ireland, enables local authorities (*i.e.*, town councils, police commissioners, and road trustees), or persons or companies with consent of the local authority, to obtain provisional orders for the construction of tramways. General rules are laid down for the construction, use, and discontinuance of the tramways, etc.

CAP. 86. "SHERIFFS' (SCOTLAND) ACT."

This Act united the counties of Kincardine and Aberdeen into one sheriffdom, and made the duties of the vacant sheriffdom of Kincardine devolve upon Sheriff Jameson without any new commission (s. 1). The 2d section disunites the counties of Banff, Elgin, and Nairn whenever a vacancy shall occur; and in that event provides that Banff shall be joined with Aberdeen and Kincardine, the functions of Sheriff of

Banff devolving on the Sheriff of Aberdeen and Kincardine without any new commission being necessary. In the same event, Elgin and Nairn fall under the jurisdiction of the Sheriff of Inverness without any new commission. It is not provided that the Sheriff of Banff, Elgin, and Nairn, in the event of his surviving his brethren of Inverness and Aberdeen, or either of them, or of these sheriffdoms being otherwise rendered vacant, shall take the county of the predecessor, and that the process of disunion of his three counties shall then take place. By section 3, Sutherland and Caithness are disunited, and the latter combined with the vacant sheriffdom of Orkney and Shetland. The Act relieves Sheriff Fordyce of his office of Sheriff in so far as regards the county of Caithness, and combines the vacant sheriffdom of Ross and Cromarty with Sutherland under his jurisdiction.

Section 4th provides that when a vacancy occurs in the sheriffdom of Linlithgow, Kinross, and Clackmannan, Linlithgow shall be united with Midlothian, Kinross with Fife, and Clackmannan with Stirling; and section 5th, that when Haddington and Berwick become vacant, the former shall be united with Midlothian, and the latter with the counties of Roxburgh and Selkirk. When the changes contemplated by the 5th and 6th sections have been accomplished, the counties of Midlothian, Linlithgow, and Haddington are to constitute the sheriffdom of the Lothians, and, when Peebles is added (which will take place under the Act of 1853), the sheriffdom of the Lothians and Peebles.

By section 7th a vacancy in the sheriffdom of Wigtown and Kirkcudbright is to be followed by the union of these counties to Dumfries, under the denomination of the sheriffdom of Dumfries and Galloway. Dumbarton and Bute, when they become vacant, are also to be disunited, and joined, the former to Stirlingshire, and the latter to Renfrew (s. 8), the Sheriff of Stirling being eventually to be called Sheriff of Stirling, Dumbarton, and Clackmannan.

The 10th section provides that appointments to the office of Sheriff after any union of counties shall have taken place, shall only be to the office of Sheriff of such united counties as vacancies shall occur after such union. And, by s. 11, the union of any counties gives no Sheriff upon whom additional duty is imposed, a right to any additional salary, but the lords of the treasury are empowered to make such addition to the salary as they may deem reasonable, to be paid out of money voted by parliament for that purpose.

Section 12th makes the unions of counties under the Act complete unions "to all intents and purposes, so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes," and "the powers, duties, rights, and privileges of procurators before the Courts of the Sheriff," the several counties being thereafter regarded in these respects as one sheriffdom. By s. 13, the Home Secretary may from time to time prescribe the number, times, and places of Courts to be held by Sheriffs appointed after the passing of the Act, and also the duties they must perform personally; and as regards all Sheriffs, the requirement of habitual attendance upon the Court of Session during the sittings

Delay, expense, unsatisfactoriness in procedure, and the unpopularity of the Court, are the evils Mr Baxter beholds in the existence of the Outer House. The delay is caused by (1) the double hearing, (2) the frequent difficulty of obtaining "the assistance of the leading counsel, and, if obtained at all, it is only after considerable delays and interruptions, and continuations of the causes from time to time, which add to the delay and expense, and break the unity and effect of the hearing." The last part of this charge we admit, and on it we have only two remarks to offer. The one is that if Mr Baxter were a practitioner in the Court of Session, and familiar with the way in which its business is distributed, or even a regular reader of this journal, he would know that the existence of the evils he deplores is not essentially due to the constitution of the Court; and the other that the evil would be greatly increased by the plan of taking proofs before the Divisions, which he considers "the preferable course." We abstain from remarking that on the point of adjournments the Sheriff Court interlocutor sheets are to the Court of Session ones as an Augean to an ordinary stable. That cases would proceed with greater rapidity before a Division than before a single Judge, we have already said, is incredible. And we go further,—we unhesitatingly assert that cases proceed more quickly before an Outer House Judge. Such a Judge is expert at the work from daily custom; he has the vigorous mind of a younger man, and he has less of that long-suffering patience which so meekly endures "a wealth of words," but which is, at the same time, accompanied by a mind instantaneously and incessantly prolific in the generation of doubts and the production of questions outwith the case.

But Mr Baxter has no faith in the Lords Ordinary. In vain the Commissioners report that three-fifths of the judgments by the Lord Ordinaries are acquiesced in. This "does not much impress" him. "Acquiescence always occurs where the losing party is worn out by delay and expense." This is strong language; and we think that in this case the brocard is reversed, and fiction is stranger than truth. We have no tables before us; but we will venture to assert that in at least three cases out of four where a Lord Ordinary's judgment is acquiesced in, the decision has been in favour of the pursuer, and that the acquiescence is solely due to the defender's having no case. Such instances of acquiescence in the Outer House as those Mr Baxter mentions are rare. Cases seldom linger in the Outer House. There is only one opinion to be consulted in settling the procedure. In the Inner House it is different. As an able counsel, now a Judge in the First Division, once acutely pointed out in urging *contradictory* arguments at the bar,—there are four Judges; and even ordinary procedure would then be, humanly speaking, certain to be slower. In accepting the remedy, therefore, that Mr Baxter suggests, we should be certain only to find the cure worse than the evil. Expense and delay are for the most part Siamese evils. But this is to be remarked: if the Outer House be abolished, and even if the delay be diminished, the expense will be greater. Inner House procedure

is the more expensive of the two. While if the proper remedy be applied to the Outer House procedure, delay and expense will decrease together.

Frequent unsatisfactoriness in the proceedings and judgments of the Outer House is the third charge in Mr Baxter's dittay. But three-fifths of the judgments are acquiesced in; and the harmony of opinion among the eminent witnesses before the Commission are "chiefs that winna ding," any more than other facts, before the opinion of even so able a man as Mr Baxter. Four-ninths of the judgments of the Lords Ordinary that are brought under review are either wholly reversed or substantially altered, he says—*i.e.*, the chances are, if a Lord Ordinary's judgment be brought under review, it will be adhered to. But then two things are to be remembered—first, that three-fifths of his judgments are not brought under review, and are, therefore presumably right; and, second, that cases sometimes go further than the Inner House, and that, when they do go further, the judgment of the Lord Ordinary is occasionally returned to. Sometimes, indeed, the concurring judgments of Inner and Outer Houses are departed from; and here, of course, by the ultimate test, the Lord Ordinary's view was incorrect. But the point Mr Baxter raises is as to the value of an Outer House decision as tested by that of an Inner House one; since, in his opinion, the latter should supersede the existence of the former; but the ultimate Court of Review still exists. In any point of view, if acquiescence is a criterion of soundness—as almost every one about the Court of Session believes—then the aggregate amount of correct Outer House judgments is to incorrect ones in the ratio of 37 to 8. And this, Mr Baxter must admit, is a formidable proportion. Nearly five times out of six a Lord Ordinary is right, or held to be right, in his decision.

The last prominent evil of the two Houses mentioned by Mr Baxter is, that it is "the main cause of the unpopularity of the Court." We admit the unpopularity, and that it is an evil; but we do not think it due to the existence of the Outer House. Indeed, if one of the two Houses had to be abolished, and amount of business were the true test of popularity, we have little doubt by the abolition of which of the two Houses that kind of popularity would be attained. We think there are other sources of unpopularity, the remedy for few of which will be found in the suggestions of the Commissioners. The numerical unpopularity of Court business is most apparent in the paucity of cases that come from the Inferior Courts. If delay quenches the litigious spirit, and induces acquiescence, the Sheriff Court interlocutor sheet, with its depressing "adjournments of consent," will explain how the hope of justice deferred makes the suitor's heart sick. If country agents have any influence over their clients, the adverse interest of the agent to carrying the case further is, they themselves tell us, a strong reason why their clients are "deterred from resorting to the Supreme Court in vindication or defence of their rights." This is what Mr M'Neel Caird, Vice-President of the General Council

of Scottish Procurators, says:—"Every country agent has the deepest interest in diminishing the Court of Session business as much as he can;" . . . "in place of the pressure which we must of necessity exercise at present for our own sakes, to prevent cases going to the Court of Session, etc." This is one of the *causes* of the unpopularity of the Court of Session.

"The course of modern legislation has been to pass over the Outer House, and introduce causes at once into the Inner House," says Mr Baxter; and the instances he cites are appeals from Inferior Courts, appeals in bankruptcy, and special cases. The answer is obvious. Appeals have had the advantage of being sifted in the Inferior Court, and special cases do not need it. In the former case, the appeals have had the benefit that Mr Baxter himself admits the Outer House gives; and in the latter, the statement of facts being joint, the only difficulty is in the law to be applied. Two Divisions, Mr Baxter thinks, would ultimately suffice; three, possibly, might be needed at present. The reasoning here is difficult to follow. Perhaps the novelty of the procedure is the reason implied why three would for a while be necessary. It cannot certainly be the decrease of business. Mr Baxter deplors the small amount of business. He calls it "a great misfortune." And the abolition of the Outer House is suggested by him as a mode of increasing the number of cases before the Court. But if only two-fifths of the cases that at present come into the Outer House go to the Inner House, it is evident that, without any increase in the number of cases, and deducting the cases that come at once into the Inner House, its amount of work would be about doubled. But if it can only overtake half this number, as is the case at present, then it follows that delay in the progress of a case must be twice as great in the Inner as in the Outer House. Yet the supplanting of the Outer House by the Inner is Mr Baxter's remedy. Rapidity being desiderated, the more expeditious Court is to be replaced by the slower. And if, as he expects, the business is to be increased by his proposition being carried out, then, by the application of the remedy we should only have the evil increased. We confess we are of that number that would

. . . "Rather bear the ills we have,
Than fly to others that we know not of."

There can thus only be one solution of Mr Baxter's problem. He must expect from a succeeding race of Judges expedition twice or three times as great as from those who at present adorn the bench. We doubt if his hopes will be realised, especially when we remember that the Judges would then have to adjudicate upon cases which have not had the benefit of being previously sifted.

It was suggested that when the record has been closed and probation renounced, the case should go before the Inner House at once. Mr Baxter, Sir Roundell Palmer, and the Lord Justice-Clerk would have this compulsory; Sir Edward Colebrooke also, if it were possible, and

if impossible, on the application of one or more parties to the Inner House; while the majority of the Commissioners approve of it if all parties consent, but reserve to the Court power to retransmit the cause where such appears the expedient course. This is an admirable suggestion, meeting most of the existing evils by the elasticity it affords. Much may be said in favour of Sir Edward Colebrooke's plan. But it is to be feared that where a litigant sought delay, he might obtain it by an application that was unlikely to be granted; while, on the other hand, there is the remedy of expenses that, by barring further procedure unless paid, might give tentative proof of a litigant's confidence in the justice of his cause. We are inclined ourselves to suggest that, perhaps, a middle course would, as of old, be safest, and not to deny the *de plano* transmission on the suggestion of one party, as the Commissioners suggest, nor to allow application to be made to the Inner House, as Sir Edward Colebrooke suggests; but to allow the motion to be made before the Outer House Judge, who is *ex officio* conversant with the cause, and to bar his judgment from question by the parties, though not by the Court.

In regard to Mr Baxter's dissent, we only further mention that he would allow motions for rehearing, appeals to the House of Lords, and secure to litigants in minor cases the advantages of a real civil circuit as in England, by requiring periodical and more frequent visits by the Judges to the larger towns. Sir Roundell Palmer, as we have said, concurs with Mr Baxter in the abolition of the Outer House; and Sir Roundell Palmer has the advantage of a certain amount of inferential knowledge of Scotch procedure. But a still more Tiresian judgment can be pronounced by such a man as Mr James Anderson, Q.C., who is a member of both bars; and he approves of the maintenance of a primary hearing before a single Judge. Sir Edward Colebrooke endorses the views of Mr Baxter as to the abolition of the Outer House; but he suggests the consequently necessary increase in the number of Judges to fifteen. And the Lord Justice-Clerk somewhat cautiously says:—

"I am satisfied that, until the Inner House comes to act in the majority of cases as a Court of first instance, no changes which can be made will have any material effect in affording to suitors the economy and despatch which are essential to the full efficiency of the Court."

We have devoted our space thus fully to a consideration of Mr Baxter's views, because they are the views of a respectable minority of lawyers in Scotland; and because stated so ably as they are, and by one in the position of Mr Baxter, it is necessary that they should be duly met. For further answer to them we need only refer to the fourth page of the Commissioners' Report, in which they say:—

"To the great majority of your Commissioners it has appeared that the present constitution of the Court is greatly preferable to that proposed. Many considerations have led to that conclusion, and among others the following:—1st, The preparation of records, the taking of proofs, and other duties (irrespective of hearing and deciding causes) performed at present by the five Lords

Ordinary sitting separately, could not be performed in the Divisions conveniently or satisfactorily, or indeed at all, nor could one Lord Ordinary overtake them, or even the greater portion of them; nor is there, as in England, a staff of officials on whom they could be devolved, even if it were considered desirable to do so—a point to which we shall afterwards advert. Accordingly, part of the proposed new scheme is, that each Division should have power to detach one of its judges to assist in the performance of these duties. This would in effect be the Outer House in another form, *minus* the judgment of the Lord Ordinary, but with the disadvantage of weakening the Inner House, on whose one judgment each cause is proposed to be perilled. 2d, The arguments addressed to the Lord Ordinary, and his judgment on the cause, are valuable as having the effect of clearing away superfluous or irrelevant matter, and bringing to the surface the points on which the case really turns. The case being thus purified, parties see more clearly what their contentions ought to be; the argument before the Court of Review is more confined to what is relevant and useful; the time of the Court is not consumed, as it would often be if there was no previous sifting of the case; and the risk of error or miscarriage is diminished. 3d, The time and expense consumed in obtaining the judgment of the Lord Ordinary, abstracted from the time and expense of the other parts of the procedure in the Outer House which cannot be dispensed with, are really not great; and certainly the judgment is obtained at very much less expense than the judgment of a Division of the Inner House would be. Indeed, the Act of 1868 has already brought about a material saving of time and expense in the Outer House, and it is hoped that alterations we are about to recommend, as to the arrangement and distribution of business, will tend in the same direction, and also tend to obviate the complaint of frequent interruption of the argument before the Lord Ordinary. The suggestion that these arguments are imperfect, because it is known that whatever judgment may be given, can be submitted to the review of another tribunal, is a suggestion that might be pointed against the principle of review in any judicial system. It is thought that, in the character of the bench and of the bar, litigants have sufficient protection against any such neglect of their interests; and the fact that so large a proportion of the judgments of the Lords Ordinary are acquiesced in, is significant on this point. 4th, If every cause is to be heard in the first instance before a Division, instead of before a Lord Ordinary, not only would the expense of obtaining a decision be much greater, but there is great reason to fear that the proposed three Divisions could not get through the work; that the progress of causes would be retarded, instead of being accelerated; and that arrears would accumulate. The hearing of a cause never advances at the same rate before a Court of several judges as before a single judge, especially if frequent reference has to be made to documents or figures. Although two Divisions are about fairly adequate to the work at present brought before them, it is to be remembered that they sit practically as Courts of Review, dealing with causes that have already being sifted before a single judge, and to some extent cleared and put in shape by his judgment. But if the first discussion was to take place in a Court of several judges, and the process of sifting and purifying to take place there, it is obvious that the time occupied in hearing and discussing each cause would be much greater, and consequently the number of causes decided in a given time by any Division would be much fewer than at present; and all the more so, if the conflict was not merely the first encounter, but understood to be also the last and only one. 5th, Of the final judgments pronounced in the Outer House by the five Lords Ordinary sitting separately, only about two-fifths are submitted to the review of the Inner House, and these constitute at present the most important part of the work done by the two Divisions. It seems extremely improbable that a third Division could with any reasonable despatch dispose of the other three-fifths, especially when hearing them under the disadvantage of there having been no previous discussion. 6th, To make the first judgment in the cause final, unless appealed to the House of Lords (a remedy often not within the reach of parties), would be perilous and unsatisfactory; nor would a mere right to be reheard before the same judges

give satisfaction. A power of review within the Court itself, and, if possible, by a tribunal stronger than that which pronounced the first judgment, seems necessary to give relief against error, and even to guard against miscarriage. But such review within the court itself could not be obtained without interfering with the progress of causes depending in the other Divisions, and thus creating another obstruction to progress, by occupying much of the time of the judges of two of the Divisions in reviewing the judgments of the third."

We shall not venture to add to these remarks, further than to point out the probable great increase in the number of appeals to the House of Lords from the adoption of Mr Baxter's proposal. Lord Westbury has been already emptying the vials of his wrath on Scotch appeals. What he would say to their increase, if under the merciful dispensations of Providence he be not removed from over us, we do not know. But we do know that the expense of a hearing in the Outer House is infinitesimal as compared with the cost of an appeal to the House of Lords. And if it be a ground of complaint that out of the lawyers in practice before the Court scarcely thirteen can be had to grace the bench, how, we should like to know, are the fifteen probably then required, to be found in a bar certain greatly to be diminished?

The cardinal remedy the Commissioners have, in the main, suggested for the evils of the Court is to give greater elasticity to its rules of procedure; and this unquestionably is the right direction. Greater power in the Court to afford redress in exigencies by acts of *sederunt* is a wise plan. Acts of *sederunt* may be objectionable by their number; but there would be little difficulty in digesting them. They are readily passed, are enacted by those who have an empirical knowledge of the evil, and can be made tentative in their nature. Then a great benefit to the Court will be the power of disposing of the Judges where their labour is needed; a temporary third division, a temporary increase in the staff of the Outer House, as the occasion requires. These are the remedies which the Commissioners suggest; and they are safe ones. For, be this remembered, we can safely try the recommendations of the Commission; but if we essay the plans suggested by the dissentients, and they prove unwise, then we may find it difficult, if not impossible, to return to the old paths.

J. A. W.

THE SHERIFF COURT AMENDMENT ACT, 1870.

33 & 34 VICT., C. 86.

WE have already referred to this statute, and have detailed the leading changes which it introduces. At first sight these appear to be rather of local than of general interest, and to involve little more than a reduction of the existing number of Sheriffs, and a redistribution of the territories assigned to each Sheriff Court. Probably little else will be the *immediate* result of the enactment, but we cannot doubt that, in the course of a very few years, it will be found that its provisions

entail consequences more serious, and changes more radical, than the profession seems at present to have realised.

The leading and conspicuous change introduced is, that to each Sheriffdom in Scotland (with the exception of Ayr, Forfar, Perth, and Lanark) a very considerable addition of territory and population has been made. For example, the Sheriff of Dumfries, when a vacancy occurs, gets an addition of upwards of 80,000 of a population. The Sheriff of Aberdeen has already received an addition of 35,000, and when a vacancy occurs, he will be responsible for about 60,000 more. In almost every case of union of counties, in fact, a very substantial increase of labour on the part of the Sheriff is necessarily involved. The result is that there will not be a Sheriffdom in the country which can be held as a sinecure, while, in the majority of instances, if the duty is to be discharged even tolerably, a very considerable portion of the Sheriff's time must be devoted exclusively to the work of his office. The additional labour will not consist merely in an increase in the number of processes which will be sent up to Edinburgh to be advised by the Sheriff on written pleadings. These are becoming fewer in number every year, in proportion as the cravings for oral hearings are becoming more numerous. The time has gone past for Sheriffs to be able to overtake their work, and at the same time, to avoid frequent journeys to their counties, by the pleasant device of reclaiming petitions and answers. Agents and clients are now more and more averse to incur the expense of these tedious and generally most unsatisfactory documents. The oral hearing before the Sheriff has become, especially in the larger towns, where the majority of the procurators are men whose time is much occupied, and who are well able to plead *viâ voce* at the bar of the Court, the favourite mode of supporting an appeal. But the visits of the Sheriff must be greatly more frequent than has hitherto been thought necessary, if he is to avoid the charge of causing delay. It will be impossible to discharge the duty of Sheriff of such a district as the united counties of Aberdeen, Banff, and Kincardine, for instance, unless the Sheriff shall visit the seat of his Court at least once in three weeks during Session. Greatly increased labour, and the loss of much time, are also involved in this addition to the size of sheriffdoms, on account of the number of places at which the Sheriff must now, once a year, hold Small-Debt Circuit Courts and Registration Courts. In the large northern sheriffdom to which we have referred as an example of the way in which the new enactment will work, the Sheriff will have to hold, in the three counties, no fewer than twelve such Courts.

Now, the necessary consequence of this seems to us to be that the office of Sheriff cannot for the future be held by advocates whose practice is even moderately large. No member of the bar can for the future combine the honour and emoluments of a Sheriff with large practice as a counsel. The one or the other must be given up. No pleader, however popular, can expect to retain his practice if he is under the necessity of being away a whole day from the Parliament

House once in every second or third week, and if, in addition, he must devote some considerable time to the preparation of judgments and other chamber work connected with his sheriffdom. On the other hand, no one can discharge the duties of Sheriff of many of the newly arranged districts satisfactorily either to himself or to the public, if he is able to devote to the work of his office only those corners of his time which he can snatch from an engrossing practice; or if he does not personally attend in his county with regularity and frequency. Some of our readers have doubtless heard Sheriffs engaged in large practice, and who had had the good fortune to be appointed to one of the tiny sheriffdoms which have now no longer an independent existence, use language such as this:—"My county exactly suits me. You know I couldn't possibly undertake a larger one." And it was true; such men could not possibly (that is conscientiously) take a larger county. But now there are no small ones, and therefore for the busy counsel there are no suitable ones. The busy counsel cannot be a Sheriff.

Then, whom are we to have for Sheriffs, if we cannot now get successful advocates? Competency we must have, now more than ever. There were snug sheriffdoms where it was scarcely possible that even an incompetent man could do much harm, but their time has passed away. No Government will venture to appoint to the large districts, as newly arranged, any one who has not given some evidence of fitness for the office. Success at the bar is not the only evidence of fitness that can be obtained. It is, however, not easy to see what other proof of capacity is so likely to satisfy the public; and in recent appointments, (not to the office of Sheriff), the present Lord Advocate has shown a disposition to promote those members of the bar in whom not only he personally had confidence, but who, by the large practice in which they are engaged, appeared to have earned the approval and confidence of the public. With his Lordship, as with the vulgar, it seems, *Rien ne réussit comme le succès*.

That the statute contemplates that the office of Sheriff must now be filled by men who are not engaged daily in the Parliament House, is further made plain by the provision of the 13th section: "So much of the Act of the 1st and 2d Victoria, cap. 119, as provides that every Sheriff, with the exception of the Sheriffs of the counties of Edinburgh and Lanark, shall, after his appointment, be in habitual attendance upon the Court of Session during the sittings thereof, shall be, and is hereby repealed." With one, or perhaps two, exceptions, we are not aware that any Sheriff was anxious to be relieved of the pleasant necessity of living in Edinburgh and mixing in its society. This clause is not inserted, we may be sure, in the interests, or to promote the comfort, of the existing or of future Sheriffs; and when it is read in connection with the provision of the same section that it shall be lawful for the Secretary of State to prescribe not only the times and places for the holding of Courts by Sheriffs "*who shall be appointed after the passing of this Act,*" but also to prescribe "the duties of the office of

Sheriff which such Sheriffs respectively are required to perform personally," the suggestion becomes far from an improbable one that this statute is not only fitted, but has been designed, to effect quietly and gradually a complete change in the nature of the Sheriff's position and duties. Two things are obvious from the clauses which we have quoted,—(1) that the framer of the Act (with characteristic intolerance of humbug) and the Legislature have declared that the idea that a Sheriff derives legal knowledge, or fitness of any sort, from "breathing the atmosphere of the Parliament House," is unfounded, and is to be no longer regarded; and (2) that as the Secretary of State has power to prescribe the duties only of such Sheriffs as shall be appointed *subsequent* to the date of the Act, it is intended that the discharge of such new duties shall involve so serious an alteration in the existing system that it would be unfair to impose them upon the present holders of the office.

J. C. T.

The Month.

The late Mr George Moir.—On 19th October last died Mr George Moir, advocate, a gentleman who had for some years retired wholly from the legal profession, but who in his time was a man of mark in the Parliament House, both as a lawyer and for his literary abilities. He was born at Aberdeen in 1800; received his university education at the Marischal College there, being considered the most distinguished student of his time; passed some years in the office of an Edinburgh law agent; and joined the Faculty of Advocates in 1825. In a short time he secured a lucrative practice as a junior counsel; and, from his well-known literary talents, was appointed Professor of Rhetoric and Belles Lettres in the University of Edinburgh. This appointment, after holding it for some years, he found it necessary to resign, from its interfering too much with his practice at the bar. Some years afterwards, and during the administration of Lord Aberdeen, with whom he was in terms of intimacy, he became Sheriff of Ross-shire, in succession to Mr Thomas Mackenzie, afterwards Lord Mackenzie; and from that county he was transferred to Stirlingshire, of which he remained Sheriff until, from great and protracted ill-health, he resigned the office in 1868. In 1864 he was unanimously elected by the Faculty of Advocates Professor of Scotch Law in the University of Edinburgh in succession to Mr George Ross, and thus resumed his connection with that learned body. It is believed that he accepted of that chair with reluctance, and in deference to the wish of the bar; and that the labour which he devoted to the preparation of a course of lectures impaired his health and contributed to the illness which prematurely arrested his career, and he thus found it necessary to resign the chair, after holding it only one year.

Fortunately this sacrifice of emolument was of small moment, as it is understood that from his practice and other sources he was possessed of an ample fortune. He was a widower, and has left one son and three daughters, one of whom is married.

Such a career necessarily implies the possession of considerable and varied talents. In person he was short and slightly made; as a forensic speaker he was fluent and unimpassioned; and the correctness and clearness of his language has probably never been surpassed. But although his opening of a case was felt and enjoyed as a finished work of art, his temperament, which was nervous and retiring, less thoroughly qualified him for the tug of war when parties came into the closer conflict of argument. He was not effective in a reply, and a jury trial he abhorred. Yet in contrast with that phase of character, his conversation was ready and brilliant, and not without a strain of polished yet cutting sarcasm, while rich in the allusions flowing from a mind profusely stored with literary and artistic lore. From an early period of life he amused himself with drawing and colouring; his performances being marked by the same neatness of finish which characterised all his legal and literary utterances; and for many years he took a practical interest in photography. In him we have lost an excellent and rare example of the union of scholarly and legal qualities. Although he frequently contributed to the literature of the day, no important work issued from his pen; but we imagine that his lectures on *Belles Lettres* must contain much that is well deserving of being given to the public. His translation of Schiller's *Wallenstein* is a very able performance, which has only been thrown into the shade by the brilliant translation of Coleridge.

The New Chair of Commercial and Political Economy—Mercantile Law in Edinburgh University.—Under Provisional Orders obtained in last session of Parliament the Governors of Watson's Hospital and Stewart's Hospital were empowered to found and endow a Professorship in the University of Edinburgh, to be called "The Chair of Commercial and Political Economy and Mercantile Law." It was left with the *Senatus Academicus*, subject to the review of the University Court, to make regulations for the proper management of the Chair, and the appointment of the Professor is vested in the Curators of the University, and the Master and Treasurer of the Merchant Company for the time being. The appointment is to be for seven years, at the end of which period the same Professor may be elected for another term of seven years, or a new Professor appointed. The Governors of the two hospitals are empowered to grant a deed of endowment in favour of the University with regard to the chair, and to guarantee an annual salary of £450. The proposed deed of endowment is now before the *Senatus*, but that body has not as yet come to any definite resolution respecting it. It is of course proper that with regard to the legal part of the course the rights of the existing chair of Scots Law should be saved. That is now practically a chair of Commercial law, both because the niceties of Feudal law

are more amply treated by the Professor of Conveyancing, and because a professor naturally devotes more time and attention to the more complex and progressive questions of the law of contracts and commercial law, than to those branches of our jurisprudence which, in the progress of time, have become settled by continued practice and the decisions of Courts. As, however, the portion of the new course, which must be devoted to Commercial law, must be limited, and can obviously interfere only in the most trifling way with the functions of the proper legal professor, we trust that any question that may arise may be easily settled. No student will attend the course of Commerce mainly for the sake of the legal portion of it, and none who wish to have an accurate and sufficient knowledge of Commercial law will fail to seek the regular legal instruction provided in the University. If Professor Macpherson would make a separation between the Mercantile and the other portions of his course in favour of young men intended for commercial pursuits, we think that the ten or twelve lectures on law, which are all that the new professor is likely to give, will be but a whet and preparative for the ampler and more satisfying prelections of the Scots Law Chair.

Among the candidates already in the field are Mr Leone Levi and Dr W. B. Hodgson, and an announcement has already been made, we believe prematurely, that Dr Hodgson is likely to be appointed. Without any disparagement to either of these gentlemen, we may be permitted to suggest to the patrons that, without leaving Edinburgh, they should have no difficulty in making a better choice. Neither of these gentlemen can be said to be properly qualified to teach commercial law, where the most trifling error may afterwards have a fatal effect on the interests of the pupil. No teacher can undertake a more delicate duty than that of lecturing to laymen on law; for there is no science of which a little knowledge is more dangerous. We hope, therefore, in the interests of the chair, that only a trained lawyer will be appointed to it. Many trained lawyers are able to lecture at least as well as any of the candidates on the other subjects embraced in the foundation; but no layman can safely lecture on law. It is probable that Mr Hill Burton, the most experienced of living economists, may have too many other occupations to permit of his undertaking the duties of the chair. But there is a gentleman in this city, who has sat at the feet of the greatest economist that Scotland has produced since Adam Smith, and who is deeply imbued with his spirit, one who has distinguished himself as a philosophical as well as a practical lawyer and law reformer, and has, besides, gained laurels in many a field of literature, to whom the patrons might offer the chair with honour to themselves and the greatest advantage to the public. We do not know whether Mr J. F. McLennan would accept the chair; but many have thought him the fittest man to inaugurate the new and difficult experiment which the Merchant Company have undertaken.

The Juridical Society's Lectures.—The Juridical Society of Edinburgh is a debating club of law students, formed nearly a century

ago for the purpose of discussing legal and other questions. Its members, after the pattern of some other societies of the same kind, when they have paid a certain number of annual contributions, become life members, and retain a connection with the society, which is, for the most part, nominal, but, on some important occasions, is attended with certain rights and burdens—the burdens preponderating. Thus, a few years ago, our distinguished Lord Justice-General delivered a very interesting and able inaugural address; somewhat more recently, Lord Ormidale availed himself of the society as an arena in which he might assail the abuses of the Court of Session; and now, the Lord Justice-General is to preside and listen to “an inaugural address” by the Lord Justice-Clerk, “on the occasion of the opening of the society’s new course of law lectures.” These are some of the burdens and privileges which membership of the society entails on its more eminent members. The society, it is also well known, has attained considerable wealth through the unpaid, and almost unacknowledged, labours of some of its *alumni* on the volumes of styles known by its name. At one time, too, it supported a Lectureship on Conveyancing, which disappeared after the foundation of the Chair of Conveyancing in the University by the Society of Writers to the Signet.

The Juridical Society admits as members only Advocates and Writers to the Signet. Only the *crème de la crème* of the legal profession can obtain access within its sacred precincts, and every one who aspires to be only a S.S.C. or country procurator is rigorously excluded from its privileges. It must be acknowledged that, among the numerous benefits it confers on the studious youth, it aids in forcing into early and rank luxuriance that priggishness which is the most conspicuous characteristic of the thorough-bred Edinburgh lawyer. From the fact that a fee of £2 2s is demanded, we infer that the course of lectures to be delivered in the coming winter is not to be confined to the two learned bodies from which the society is recruited, who, we presume, scarcely need such instruction, but that they are intended to elevate the mental condition, quoad jurisprudence, of those who cannot in the nature of things be members of the society. We congratulate the society on the step it has taken; and as philanthropy in these days is a fashionable virtue, we trust it will be duly appreciated.

We are glad to find that the young gentlemen who at present attend the meetings of the society are getting encouragement from their seniors in the good work they have begun. The address of the Lord Justice-Clerk will doubtless not only be eloquent but instructive and stimulating. The names of the lecturers for the coming session guarantee a valuable series of essays. Professor Innes will lecture on the legal antiquities of Scotland. Sheriff Thoms is known to have been directing his thoughts for some years to the subject of “the Law of Scotland as a System of Equity;” and the nineteenth century will yield many illustrations and developments of Scottish equity of which Lord Kames could not dream. Mr Kinnear is thoroughly qualified to enlighten the world on the difficult subject of teinds; while Messrs

Crawford, Mackay, and Kirkpatrick are sure to interest and instruct their audience by their prelections on insurance, procedure in the Court of Session, and the Roman law of hypothec and succession.

Proof of Negligence—Res ipsa loquitur.—(See above, p. 561.)—A correspondent kindly refers us to the cases of *Lyon v. Lamb*, June 22, 1838, 16 S. 1188; *Macaulay v. Buist*, Dec. 9, 1846, 9 D. 245; *Sneddon v. Adie*, June 16, 1849, 11 D. 1159; *Whitelaw v. Moffat*, Dec. 27, 1849, 12 D. 434; *Cook v. Duncan*, Dec. 2, 1857, 20 D. 180; as recognising the application of the brocard *res ipsa loquitur*. Although the principles laid down by Lord Fullarton in *Macaulay v. Buist* have frequently been pressed too far by counsel at the bar, and have therefore been frequently the subject of observation and definition by the Judges, we do not think that any doubt can be entertained as to their soundness. The sum of the whole matter appears to be this:—A pursuer is bound to prove his case; and an accident unexplained is not presumed to arise *ex damno fatali*. Hence the pursuer must connect the defender with the accident, i.e., must establish the relation or duty giving rise to the claim of damages; and, that being done, if the defender means to show that he could not help it, it is for him to prove that, not for the pursuer to prove the contrary.

General Council of Procurators in Scotland.—The annual meeting of this body was held within the General Council Rooms, 126 Princes Street, Edinburgh, on Thursday, 22d September. Among the members present were Messrs J. B. Baxter, President of the Faculty of Procurators, Dundee; A. M'Neel Caird, Dean of the Faculty of Procurators of the Rhinns of Galloway; A. Paterson, Dean of the Faculty of Procurators, Glasgow; James F. Murdoch, Representative Member of the Faculty of Solicitors, Ayr; Sir Wm. Broun, Dean of the Faculty of Procurators, Dumfries; D. R. Morice, Representative Member of the Society of Advocates, Aberdeen; W. Brown, Representative Member of the Society of Solicitors, Hamilton; John Forbes, President, Society of Solicitors, Banff; J. Hardy, Representative Member of the Faculty of Procurators, Linlithgow; M. Jamieson, President, Society of Solicitors, Perth; John Gair, Dean of the Society of Solicitors of the East of Stirlingshire; William Shires, Dean of the Society of Solicitors, Forfarshire; T. Clark, Representative Member of the Society of Solicitors, Airdrie; A. Morrison, Representative Member of the Society of Solicitors, Elgin; T. King, Dean of the Faculty of Procurators, Greenock; A. Black, Dean of the Society of Solicitors and Procurators, Cupar-Fife; W. M'Clure, Representative Member of the Faculty of Procurators of the Lower District of Wigtownshire, etc. On the motion of Mr Caird, Mr J. B. Baxter of Dundee was unanimously re-appointed President. On the motion of Mr Baxter, seconded by Sir Wm. Broun, Bart., Mr A. M'Neel Caird, Stranraer, was unanimously re-appointed Vice-President. Mr J. W. Barty, Dunblane, was re-elected Secretary and Treasurer; and the following gentlemen were elected special Councillors—Messrs J. F. Murdoch, Ayr; A. Paterson, Glasgow; John Gair, Falkirk; Sir Wm. Broun, Bart., Dumfries; and

Mr D. R. Morice, Aberdeen. The meeting thereafter proceeded to fix the rate of assessment on the local societies for the current year. The remainder of the business was not of public interest. Diets of examination of applicants for admission as procurators were held by the examiners of the General Council, within the General Council Rooms, Princes Street, Edinburgh, on the 19th, 20th, and 21st September. The following applicants were found duly qualified for admission—viz., J. T. S. Doughty, Berwick; J. G. Monro, Clackmannanshire; A. Johnstone, Dumfries; R. Douglas and D. M'Donald, Edinburgh; R. H. Miller, Fifeshire; D. F. Dallas, Inverness-shire; W. B. Milne and R. M'Ilvride, Perthshire; James Turner, Renfrewshire; A. B. Matthews, Wigtownshire.

Re-Arrangement of the Sheriff Court Business of Aberdeen and Kincardine Shires.—The arrangements for conducting the Sheriff Court business of Aberdeen and Kincardine, consequent on the union of both counties under one Sheriff, are now about completed. The following rules, for the guidance of those immediately concerned, will take effect on and after to-day:—"1. All civil ordinary and summary causes shall proceed before either of the two Substitutes at Aberdeen up to the date of adjusting and closing the record, when the causes shall then be separated, and given alternately to the two Substitutes under separate rolls. 2. All depending causes, in which the record has been closed, but on which no debate has been taken or proof led, shall be equally divided between the two Substitutes, and entered on separate debate-rolls at the commencement of the arrangements. 3. All depending causes in which debates or proofs led in whole or in part by Sheriff Thomson remain with him till their termination." The two Substitutes are Sheriff Comrie Thomson, Aberdeen, and Sheriff Dove Wilson, presently residing at Stonehaven. The work will now be more equally divided between the two than it has hitherto been. There are to be three ordinary Courts in Aberdeen during the week—viz., on Monday, Wednesday, and Friday; one at Peterhead on Tuesday; and one at Stonehaven on Wednesday. It is proposed that Sheriff Thomson shall be at Aberdeen on Monday, Peterhead on Tuesday, and Aberdeen on Wednesday and the remaining days of the week. Sheriff Wilson, on the other hand, is to be generally in Stonehaven on Monday, Aberdeen on Tuesday, Stonehaven on Wednesday, Aberdeen alternately with Sheriff Thomson, on Thursday, Aberdeen on Friday, and in Stonehaven during the remainder of the week.

A Digest of Lord ——'s Evidence before the Royal Commission as to Jury Trial:—

I.

"It may be dramatic, it doubtless is dear;
But yet I most strongly assure ye,
To assess what's to pay, to turn dark into clear,
There's nothing like trial by jury.

II.

"A Judge may go wrong, I frequently do,
Both in questions of law and of fact;
The counsel look black and the agents look blue,
But I hide my annoyance with tact.

III.

"When the Court overturns what on proof I have 'found,'
And the litigants get in a fury,—
It only confirms the view I propound,
That the case should have gone to a jury."

G. J.

Eheu!—

O tempora, O mores!
 Court sits, vacation o'er is;
 Time was, but now no more is;
 O bl—t those meddling Tories,
 Bright OCTOBER's windy chorus
 E vok'd no thoughts dolorous,
 Recalled not town and toil to bore us.

AJAX.

An English County Court Judge.—The appointment of Mr Edmond Beales to a county court judgeship is a well-deserved tribute to his exertions on behalf of law and order. Who is so well fitted to preside over a court of justice as one who presided over the destruction of Hyde Park railings, and who has proved his qualifications for the post by the final recovery of the small debt due to him from her Majesty's Government? County Court employment is, moreover, an honour peculiarly adapted for Mr Beales. The original creation of these Courts or schyremotes is generally attributed to King Alfred, whom as a reformer of law and manners and a promoter of political learning Mr Beales, M.A., greatly resembles. As Alfred by his skill on the harp obtained admission to the Danish camp and defeated his enemies, so Mr Beales by harping on one string of popular grievances was able to enter Hyde Park and to rout Sir Richard Mayne and his forces. Again, as King Alfred was so busily employed in trimming his bow and arrows that he let the cakes in the cottage burn, so Mr Beales, while engaged in trimming his political weapons, allowed his revising barristership to slip through his fingers; and last, but not least, Alfred was personally engaged in fifty-six battles, while Mr Beales has taken a prominent part in fully that number of public meetings of a stormy character, and has so comported himself that the words Beales and Bravery may be considered synonymous. But what makes the appointment so gratifying is the immense encouragement it gives to the trade of political agitation. Any young man of average ability may by forcing his way into the parks when the gates are closed stand a chance of obtaining lucrative public employment. It is true the difficulties are somewhat enhanced since that memorable July evening four years ago. Stronger railings have replaced the rotten old fence which fell before the fury of Mr Beales's followers. But the stronger the railing the greater the glory of the destroyer; and what bars shall confine the ambition of the orator who sees in the stump a convenient stepping-stone to the judicial bench?—*Pall Mall Gazette.*

Appointments.—Mr William Thomson, Depute Sheriff-Clerk of the western district of Perthshire, at Dunblane, has been appointed by the Court of Session as interim Commissary Clerk of Perthshire, vacant by the death of Mr Young.

No successor has been appointed to Mr Archibald McNeill as Principal Clerk of Session. It is understood that Mr John Macritchie will succeed to the office of Assistant Clerk of Session in the office of Mr McNeill, vacant by the death of Mr Colin Mackenzie Fraser. The delay in filling up the office of P. C. S. is not, so far as we remember, justified by any recommendation of the Royal Commissioners: but the general opinion of the profession is, on the contrary, that additional duties should be imposed on these officers. It is therefore to be regretted that the offices of the Court should be thrown out of gear by a delay, which, as in previous cases, may turn out to be a delay without any wholesome result.

Obituary.—DAVID SHAW, Esq., W.S. (1812), died at Wellington Square, Ayr, October 9, aged 82. Mr Shaw held, for a long time, the

offices of Clerk of Supply and Keeper of the Register of Sasines for Ayrshire. Mr Shaw was trained in the office of Mr Crawford Tait, W.S., father of the present Archbishop of Canterbury, and at that time factor for the Marquis of Bute. In 1816 he went to Ayr to take up his father's business. In 1820 he was appointed Clerk of the Peace for the County, an office which he held till 1866, when he was succeeded in it by his son, Mr C. G. Shaw. Shortly after, he was appointed Keeper of the Register of Sasines for the County, which he held till the recent abolition of that office. Both these offices had previously been held by Mr Shaw's father. In 1819 he was elected Clerk of Supply for the County of Ayr. Mr Shaw was a brother of Mr Patrick Shaw, Advocate, the father of our present system of reporting, and eminent for many valuable contributions to legal literature.

CHARLES NEAVES, Esq., B.A., Advocate (1864), son of the Honourable Lord Neaves, died suddenly, of apoplexy, at Edinburgh, Oct. 6.

JAMES DALGLEISH, Esq., of Westgrange and Ardnamurchan, W.S. (1825), died September 30.

ROBERT RICHARDSON, Esq., Writer, Haddington, Clerk of Supply for East Lothian, died at Haddington, October 9, aged 44.

ANDREW FYFE, Esq., S.S.C. (1839), (Fyfe, Miller & Fyfe), died at Edinburgh, October 24.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTSHIRE.—Sheriffs TAIT and BARCLAY, LL.D.

BLAIR v. MILLER (THE PERTH PARR CASE).

Conviction.—Salmon Fisheries Act, 1868—Salmon—Parr.—In October, 1869, Mr Blair, clerk to the Tay District Board, brought a complaint against Robert Miller, railway pointsman, for being in possession of "nine smolts or salmon fry," concluding for one penalty of not more than £5. The S.S. issued the following interlocutor and notes:—

Perth, 8th October, 1869.—Having heard parties' procurators, and made avizandum with the complaint and the proof: Finds it proved that on the day libelled the defender had in his possession certain fish commonly known as parra, but which are not named in the prohibitory and penal clause libelled; but finds it not proved that he then had any fish known as smolts, the only fish named in the same section of the statute libelled, and declines to inquire and decide the question in natural science whether parr be, or be not, salmon fry: Therefore dismisses the complaint, and decerns against the complainer in favour of the defender for one pound of costs, with the expense of extract.

Note.—This is a complaint at the instance of Mr Blair, acting for the Tay District Board, against Robert Miller, laid under the 19th section of the Salmon Fisheries Act, 1868, setting forth that, "in so far as, upon Saturday, the 26th day of June, 1869, or about that time, the said Robert Miller had in his possession nine smolts or salmon fry, and that at or on

the banks of the stream called the Machony, a tributary of the Earn, and at a part of said stream at or near to the farm of Kirkton, in the parish of Trinity Gask, and county of Perth, and the said nine smolts or salmon fry were seized in virtue of said Act."

The proof is that the accused was found on the banks of Machony on the day libelled. A river watcher asked him what take he had? The accused readily answered that he had taken some eels and a few small parrs. On being asked to show the contents of his basket he unhesitatingly did so. In addition to the eels, there were found nine small fish, all which were captured by the watchers. These were exhibited in Court in two bottles. An additional third bottle was shown merely by way of contrast, containing a larger fish, which was sworn to be a yellow trout, and was admitted not to belong to the salmon family. Five of the smaller fish were sworn to as being parrs, and four in the second bottle as belonging to a migratory class which might be the spawn of sea trout or of the bull trout, but which were also sworn to be of the tribe salmon. These facts were sworn to, by one river watcher and the river superintendent, but more especially by the keeper of the breeding seminary at Stormontfield, so well and widely known as "Peter of the Pools." He entertained no doubt as to the five in one of the bottles being identical with those which for many years have been under his fostering care and nurture as parrs; but as to the four in another bottle, not coming under his guardianship, he could only state that they were of a migratory kind, and fell under another class, which he considered not to be parrs, but, nevertheless, to be of the salmon kind. The complainer offered further scientific evidence to establish that all the nine fish were salmon fry; but, from the opinion entertained by the Sheriff, this further evidence was not allowed. To admit such evidence appeared to the Sheriff open to the grave objection that it was to constitute an offence *ex post facto*, and that the very necessity of having such evidence established that there was no obvious offence under the letter of the statute.

The solicitor for the defence, on this evidence, took two pleas against conviction—

1st. That it had not been proved that the accused had in his possession the parrs or other fish wilfully, thereby meaning that it must be proved that he was in the knowledge that the fish he had in his basket were smolts or salmon fry. The evidence showed that, whilst he in his ignorance thought all the nine fish to be parrs, only five fell under that name; and there was no proof that he knew that any of the nine fish were salmon fry. And,

2d. That the fish in his possession were not proved to be smolts or salmon fry, which are the only words in the clause libelled.

The Sheriff is certainly not much enamoured with the phraseology of the 19th section of the Act 1868, which is the one libelled on. The first question is whether the word "wilfully," at the commencement of the section, overrides and qualifies the particular offence libelled—that being not the taking, but the having in possession, smolts of salmon fry. It is clear that the term wilful was not meant to override the whole clause, seeing that it is shortly afterwards twice repeated; indeed, in one part of the clause there appears the gross absurdity that it is made an offence to place any devices or engine for the purpose of obstructing the passage of the young of salmon; and it is equally made an offence, according to strict grammatical reading, "wilfully to injure that device or engine." On

the whole, however, it does appear that the qualifying word "wilfully" does reach the act of possession. (See—25th May, 1868—Johnston Couper's Justiciary Reports, 41). It is next to absurd to suppose that a person merely having possession of the forbidden fish should be dealt with more harshly than one who actually captures the animals; so that it would be necessary to prove that a person wilfully caught the forbidden fish, but not when a party may innocently and in ignorance be in possession of the sacred fish—it may even be in the act of cooking or of mastication. A man fishing can scarcely be supposed to do so in ignorance and against his will, and if on a salmon river, he must be held culpable if he, even in ignorance, takes any fish of the salmon kind. But a person may have possession of fish not only in ignorance of the class to which they belong, but even that he had in his possession fish of any kind.

The Sheriff is of opinion that it is perhaps not necessary to libel wilful possession as pled *in limine*, yet that before conviction either for taking or possessing fish of the forbidden species, it must appear that the accused party offended culpably, and not in ignorance—that is, that he knew, or under the circumstances should have known, the kind of fish he captured or had in his possession.

There is more difficulty in the second question. The 19th sec. expressly defines the offence to apply only to smolt or salmon fry. The marginal index (which note very properly is held no part of an Act and is often found even contradictory to the text) in this instance makes use of the terms "the young of salmon."

The words of the text are not cumulative, but descriptive. The law does not say smolt *and* salmon fry, but smolt *or* salmon fry—that is, smolt being salmon fry, or, as the margin has it, "the young of salmon."

The proof showed that the accused party here held possession of a certain number of parrs, and vaguely knew them by that given name; but it must be further shown that these are not merely "the young of salmon," as in the margin, but are either "smolt or salmon fry," as set forth in the text and in the complaint. Now, the Act 1862 (which appears still in force), declares salmon not only to include salmon (certainly a most Irish conclusion), but, in addition, "grilse, sea trout, bull trout, parrs, and other migratory fish of the salmon kind." This, certainly, is very comprehensive, and, with the exception of eels and flat fish, appears nearly to include all river fish whatever. The complaint is not for having in possession salmon (and unless when in a foul state such is not an offence), but it is having in possession smolts or salmon fry, and the offence applies to the whole year—open time as well as close time—and therefore is most stringent and severe. Again, it will be noticed that the interpretation clause distinguishes smolts from parrs, consequently it does not at once follow that the accused has contravened the words of the statute, since, whilst smolts are expressly mentioned, parrs are not. The framer of the statute knew and had provided for the distinction. Therefore, when he only sought to cast his net of protection over smolts as salmon fry, he must be held to have permitted the lucky parr to escape through the meshes of his legal net. This, then, admittedly drives the complainer, if it be competent, to prove, as he offered to prove, that parrs, which confessedly are not smolts, are the "fry of salmon."

By the first Act of the multitudinous series (1828) section 4, which perhaps stands still unrepealed, the offence of possession is made applicable to

"spawn, smolts, or fry of salmon;" and let it be observed that "wilfully" is there expressly repeated before the enactment as to possession. Reading the whole section of the Act 1868 in connection with the 4th section of the Act 1828, the Sheriff-Substitute is of opinion that what is meant to be included are not parrs, but smolts and salmon spawn, and spawning beds; and that the 19th section does not apply to parrs that have reached a higher state of progress than mere fry. Dr Johnston defines "fry—the swarm of little fishes just produced from the spawn." "Spawn," the Doctor defines as "the eggs of fish." The Imperial Dictionary (a work of great scientific authority) defines fry, "a swarm or crowd of little fishes, so called from their crowding, tumbling, and agitation."

Penal statutes are always, and most justly, strictly interpreted for liberty, and against prohibition and coercion of freedom. The salmon statutes are obtained for the protection of property in salmon against the encroachments of the public. These statutes are framed and promoted by the proprietors, and they ought to be so distinctly expressed that the public may clearly know the limits of their rights, and the restraints thereon in favour of the proprietors of fisheries ought to be so clear, that he who "runs may read." Parties ought not to be punished through mere ignorance of a law so vague as to require scientific knowledge and interpretation.

A sketch of the Act with reference to the nomenclature of salmon will illustrate the meaning of the Sheriff-Substitute. The first of the series 1828, included "salmon grilse, and other fish of salmon kind." In 1844, a party was brought before the Sheriff-Substitute (who is now judging of the present case) charged, under the Act 1838, of being in trespass with intent to kill fish as particularly enumerated in the Act. It was proved that the accused party had taken whitlings, not named in the statute. It was thereon maintained for the complainer that whitlings were of the salmon kind. Contradictory evidence on this question was given, and though the evidence certainly preponderated for the complainer, the Sheriff-Substitute refused to convict. His decision will be found fully reported in the Dundee Law Chronicle, vol. ii., page 133. This judgment was wisely acquiesced in, and the proper remedy was taken the very same year by the Act in 1844, by expressly mentioning whitling in the enumerated class.

In 1858, a complaint was presented to the Sheriff-Substitute (Grahame) at Dunblane, against a person for taking parrs from the River Allan. There, again, contradictory evidence was given as to whether that fish was of the salmon kind, and the judge dismissed the complaint on similar grounds as the Sheriff-Substitute at Perth had previously done. His able notes will be found at page 124 of the same volume of the Law Chronicle. The fishing proprietors wisely acquiesced, and once more met the difficulty as they did before with smolts. The Act 1862 extended the term salmon so as for the first time to include itself, and also grilse, sea-trout, bull-trout, smolts, and parr, and other migratory fish of the salmon kind. Under this extension there could now be no doubt that, in all sections which impose penalties for interference with salmon, parr is included.

But the Act 1868 introduces a new and highly penal offence, and which goes far beyond the protection of salmon in its advanced stages. It is limited only to one of the enumerated names, "smolts," with the *addenda* or (not *and*) salmon fry, which is merely a designation of smolts. If it was meant to extend the penalty to a farther and undefined extent, and to include parrs or any other class of salmon fry, or the young of salmon,

within the clause and under the prohibition, it should have been so enacted, and the question not left to be ascertained by scientific proofs. Suppose the clause had simply been for the protection of salmon fry or the young of salmon, without the mention of smolts or any named fish, would it have been permitted that a person could be prosecuted and punished for interference with smolts, parrs, or any other fish which could have been proved by scientific men to be the rising generation of the salmon family from the ova to the oven? The Sheriff-Substitute, therefore, feels himself constrained to repeat his views in the smolt case, confirmed by his brother at Dunblane in the case of the parrs. The simple ground of his judgment is that, in the penal clause founded on, parrs are not mentioned, and he declines to inquire and decide the scientific question whether salmon parrs are salmon fry or the young of salmon. The proprietors have their remedy by expressly including parrs in the section amongst salmon fry, and to leave no room for escape from the penalty.

It may be added that the solicitor for the accused urged what appeared in evidence, that his client was not a salmon poacher, or even a habitual fisher, but only on this day had obtained leave of absence, and for that day only had become a disciple of Isaak Walton.

His ignorance of the finny tribe was shown by his frankly classifying the whole of his nine captives under the section of parrs, whilst the more practised eye of "Peter of the Pools" indignantly repudiated four of the number from that high dignity, and placed them under a mongrel species, not of the pure breed. Nevertheless, had the word parr been found in the section libelled, then, whilst such considerations ought to have had their weight and effect with the prosecutor, they could have had none with the Judge farther than in modification of the penalty.

On an appeal to the Circuit, Lord Jerviswoode, on 5th May, 1870, "re-called the Sheriff's judgment, *in hoc statu*, and remitted to the Sheriff to inquire into the several matters raised under the complaint, and thereafter to dispose of the cause, and of the whole matter of expenses;" but Lord Jerviswoode found the respondent liable in the expenses of the appeal. The case having returned to the S. S., after a lengthy proof, he, of new, dismissed the complaint by the following interlocutor and Notes:—

Perth, 12th July, 1870.—Having taken proofs for the prosecution and the defence, heard parties' procurators thereon, and made avizandum with the proofs and whole proceedings: Finds it not proved that in the popular and well understood sense any of the parrs found in possession of the accused on the day libelled were "salmon fry:" Therefore finds the complaint not proved, and dismisses the same; decerns against the complainer in favour of the accused for expenses, and the expense of extract.

Note—The remit from the Appeal Court did not specify the issue which the Sheriff-Substitute was now to try. The parties agreed that it was simply whether the parrs or any of their number found in possession of the accused, time and place libelled, were "salmon fry," so as to bring him under the penal section of the statute. The complainer adduced three witnesses—the first, the keeper of the breeding beds or ponds at Stormont-field; the second, Mr Brown, of the Perth Academy, an enthusiastic fisher, and a writer on the natural history of the salmon; the third had been a practical or professional fisher both in Scotland and in Ireland. All these three agreed that parrs were the young or "fry of salmon." The details of their testimony were that salmon escaping from the egg carry

with them for a period of about four months an appendage of a bag, which they then absorb and assume the status and name of parr. In this state their term of existence is varied—some remaining in the river for one, two, three, and even four years. They then assume the scaly form of smolts, and go to sea to return next year as grilse. So soon as they emerge from the egg they are termed fry or parr. They continue that name until they step into the class of smolts. Parrs, however, are not limited to the young of salmon either in name or in fact. Sea-trout, yellow-trout, and bull-trout also have their respective parrs, and it is sometimes not easy to distinguish members of the three families the one from the other. One of these classes does not fall within the salmon tribe. The witnesses for the prosecution stated that parr when single and solitary is termed "parr," but when in numbers, they receive the name of "fry," as correctly designated by lexicographers. Something, however little, may be set against the weight of the evidence of the complainer's witnesses, in so far as their experiments were chiefly made with ova and its products in ponds and wells and not in a running stream, which it may be supposed is the more natural *habitats* of fish, and to which the witnesses of the defender had their attention solely directed. For the defence there were seven witnesses, who were all more or less enthusiastic fishers of long and great experience, and they were all of decided opinion that the parr was a distinct fish, not owing its parentage to the salmon, and of course not by any process of development metamorphosed into that fish. They formed their opinion, not on the nice experiments of the complainer's first two witnesses, but chiefly on one ground, that parrs were found in the river all the year round, and did not migrate, whilst smolts were only seen in the river at a particular season in spring; also, that sexual organs were seen developed in the parr. They all agreed that in popular language parrs, which are of different classes, are never called or known as the young of salmon or "salmon fry," but simply and distinctly as "parr." The Sheriff-Substitute keeps steadily in his view the grand recognised principle that penal statutes are always strictly interpreted for the offence, and liberally for the alleged offender, and that wherever there is a doubt it must be given in favour of the alleged culprit. If the Sheriff-Substitute were now called on to decide the question as a naturalist seated in the academical chair, he must confess he would yield to the weight of the testimony given for the complainer; that evidence, founded on long and minute experiments by experts, would have led him to decide as a point of science that parr, or at least certain of that family, were the young of salmon. At all events, there was sufficient evidence to throw great and grave doubts on the opposite position, that they were all a separate class of one finny tribe. He therefore might, even in the scientific view, have found it safer to leave it, as until lately it was even by naturalists held to be an open question in science. But sitting as he does as judge, interpreting a highly penal statute, the strong evidence on the other side has forcibly led him to the conclusion, that in popular opinion and language parr is still held a distinct species of fish, and not of the salmon kind. He cannot bring himself to settle a scientific question at the expense of the unfortunate defender, who, as well as his seven witnesses, and it is believed the general and unscientific public, are not yet educated up to the high and nice standard of development of species. It was monstrous to punish Galileo, the astronomer, for denouncing the popular opinion by set-

ting up his own correct theory of the solar system; but it would have been still more monstrous in those days to have punished any of the general public for adhering to the incorrect opinion of Ptolemy which they had been taught and believed from generation to generation. The question here raised is not unlike that in the celebrated Torbanehill case, where a lease of coal was sought to be set aside because that some scientific men were of opinion that the substance actually found underground was not precisely elementary coal as popularly understood, but some bituminous matter of a different kind and greatly enhanced value. Both the jury and the judges, notwithstanding a host of scientific witnesses, repudiated such nice distinctions, and sustained the lease. Lord Rutherford well observed—"We are not contending about what is the proper definition of coal, or about what the true components of coal are. These are matters of natural history. The question is, What was let under this lease?" This may be thus well parodied in this case—"We are not here contending whether parr is, or is not, salmon fry, or the young of salmon. That is a question of natural history. The question is, Whether parr is under the statute declared salmon fry, or the young of salmon?" If such rule of interpretation was followed in a civil suit, much more ought it to prevail in a criminal prosecution. Parr is otherwise mentioned distinctly, and protected in other clauses of the statute, but not here; and it follows that the framer of the statute knew of their existence, but did not intend them to be included in this highly penal clause. The salmon proprietors can easily remove the difficulty in the next of their long statutory series, by expressly naming parr in this penal clause. It will not do in this age and country to imitate the example of the Roman Emperor, who had his penal edicts in so small characters and elevated in so high positions that the people could not read them, and so, of necessity, offended in ignorance to the benefit of the public treasury. The Sheriff-Substitute refers to the opinions expressed in his former notes, to which he still, with deference, adheres, and he has only to add that he has decided the case judicially and entirely on the evidence. Unfortunately, perhaps, for himself, he never had sufficient time, and perhaps taste, to cultivate the piscatorial art, and therefore he has no personal knowledge on the subject, no strong prejudice to disabuse, nor any particular predilection or theory to gratify.

The case once more was appealed, and heard at the last Perth Circuit. The Judges (Lords Justice-Clerk and Cowan) recalled the judgment of the S. S., and convicted the defender in the sum of nine shillings, being one shilling for each fish, but found neither party entitled to expenses.

[*Note*.—Apart from the important question on the merits involved in the Circuit decision, there are some matters of legal principle and form which admit of grave consideration. 1st. The Circuit Judges, for the first time, have convicted for statutory penalties, contrary to the well-known opinion expressed by the whole Court under a remit from the House of Lords, "that the Court of Session has not, by the law of Scotland, power to find a defender liable in penalties, such defender not being convicted before a Justice of the Peace," 25th June, 1838, *Morrison v. Mitchell*. 2d. The clauses founded on, and the complaint, only authorised one penalty for the offence, but the Judges awarded a penalty for each fish. 3d. The statute authorises one special mode of recovery—by imprisonment, but the Judges authorise the common law mode of recovery—by poiding. 4th. A penalty is imposed for nine fish, whereas only five were proved to be

parr; and, lastly, the Judges proceeded solely on the interpretation clause, which included parr under the class of salmon. But so also is bull trout, and therefore bull trout are now judicially held to be salmon fry. Besides, the clause libelled (which extends the offence over the whole year) names smolts, which being also included in the interpretation clause, did not require to be separately named as salmon fry, according to the view expressed by the appeal Judges.]

Act.—Blair.—Alt.—MacLeish.

SHERIFF COURT OF PERTHSHIRE.—Sheriff BARCLAY, LL.D.

PRESBYTERY OF DUNKELD *v.* WIGHT.—*Aug.* 23.

Church Courts—Witnesses.—Several witnesses having failed to attend before the Presbytery, application was made to the Sheriff for warrant to cite them, against which some of their number lodged a *caveat*, and was thereon heard by an agent.

Perth, 23d August, 1870.—Having heard parties' procurators under the caveat lodged for certain of the parties named in the petition, in respect that evidence is produced that all the parties therein named were duly cited under Presbyterial warrant, and failed to obey the same by attendance, grants warrant as craved to cite them to attend at the diet named under certification.

Note.—Had the Sheriff-Substitute doubts of the competency of the application he would of course have refused it in whole, as well with those for whom a caveat has been entered up as with those for whom no such precaution had been taken. The Sheriff-Substitute is quite aware that a difference of opinion has existed in Sheriff Courts as to the power of the Civil Courts to interpose their authority to enforce the attendance of witnesses before an Ecclesiastical Court. He never entertained these doubts, and has more than once granted the aid sought. The Sheriff-Substitute regrets he has not been allowed greater time more fully to express the grounds on which he has founded his opinion. But as the citation is sought to be given to-day, he is obliged thus very briefly to state some of these grounds. He is of opinion that witness-bearing is a duty which every individual member of society is bound to render to another for the ends of justice, as well on the side of a claim as in defence. Such duty is not to be eluded on nice distinctions, and the ordinary Courts are instituted so that justice be done in every shape. Accordingly, from the earliest period of our constitutional law, so far back as the time of Lord Stair (1690), the Court of Session has been "in use to grant warrant in course for the citing of witnesses, or for the exhibition of writings before arbiters." See cases in Morrison, p. 684. In the case of Harvey, 6th July, 1826, Fac. Col., the Court held an application to the Judge Ordinary to be the proper course of procedure in such cases. It would appear a startling anomaly in the administration of justice that, in an arbitration where a tribunal is created solely by the will of private parties, the referees can call on the civil magistrate to enable them to dispense justice, but that the same power is denied to a constituted tribunal of the land. A distinction has been taken that, because the Church Courts are statutory and recognised tribunals, they should be left to enforce their own orders. At one time, when one Church embraced the whole land, and the spiritual powers and sanction were far more stringent than those of the civil magistrate,

this might have been admissible as an argument; but now, where no such monopoly of power exists, the ecclesiastical sanction would be futile beyond those who are within the pale of the Church, and even with those within, the spiritual penalty on contumacy is much too serious a matter to be desired or indulged in. Nevertheless, the Sheriff-Substitute would not at the first grant his authority, but would, as has been here done, allow the Church first to exercise its authority, with the hope that the proper desire that justice should be done would operate on the many to accept of such call to give evidence without the necessity of seeking the aid of the civil power. It was correctly stated by the solicitor for the witnesses for whom he appeared, that, in the draft of the Belhaven Act (1863), a clause was introduced empowering the civil magistrate to give such warrants as are now craved. The clause was suggested by the Sheriff-Substitute to remove the doubts which had arisen in some Sheriff Courts. It was greatly misunderstood, and unwisely objected to from quarters least expected, and was therefore withdrawn on opinions expressed by the highest authorities, that such new law was wholly unnecessary and uncalled for, seeing that the power already existed, and had been long exercised at common law and under ancient statutes.

The parties, with two exceptions (one being a case of sickness), obeyed the Sheriff's citation, and were examined on the 24th August.

SHERIFF COURT OF SUTHERLANDSHIRE.—Sheriffs MACKENZIE and FORDYCE.

MACKAY v. MACLEOD.—Aug. 20.

Debts' Recovery Act, 1867—Competency—Expenses.—The claim, as sued for, is fully set forth in the Sheriff-Principal's interlocutor, quoted below.

At the first hearing of the cause, the case of Robertson, decided by Sheriff Barclay of Perth, and reported in the *Journal of Jurisprudence* for 1868, p. 434, was relied on by the defender as supporting a preliminary defence stated by him against the competency. The Sheriff-Substitute sustained this defence, and dismissed the action, with 11s 6d of ordinary expenses; holding that the action was really one of count and reckoning between the parties, and adding in a Note—

"From the pursuer's own statement of his case, it appears there was no sale of the lambs in question to the defender, and the pursuer's contention, therefore, that the transaction fell under the category of a "merchant's account," must be repelled. The defender may be under an obligation to account to the pursuer for the value of these lambs, but it is not thought that such an obligation can be enforced under the Debts' Recovery Act. But even if there had been a sale of these lambs to the defender, the Sheriff-Substitute is not disposed to hold that the Debts' Recovery Act was intended to apply to sales of live stock."

On appeal by the pursuer, the Sheriff recalled the Substitute's judgment as follows:—

Edinburgh, August 20, 1870.—The Sheriff having considered this cause on the appeal of the pursuer against the interlocutor of the Sheriff-Substitute of 29th July last, and advised the same, sustains said appeal, recalls the interlocutor submitted to review, finds in point of fact (1) that the action is brought to recover payment from the defender of the specific sum of £24 7s 6d, "being the value of the sixty-five lambs delivered to the

defender in September, 1868, for transmission to, and sale in, the London market, and which the defender failed to account for, at 7s 6d each;" (2) that, as set forth in said interlocutor, the defender had pleaded in defence, that the action was incompetent, in respect that the debt sued for did not fall within the class of claims allowed to be recovered under the provisions of the Act 30 and 31 Vict., cap. 96, the ground being that the action was an action for count reckoning and payment; (3) finds, in point of law, that the action, as laid, involves no question of accounting in point of principle: that the claim is for payment of a specific sum on the sale and delivery of a certain number of lambs to the defender at an equally certain price, and therefore it falls within, and may competently be tried under, the said Act of Parliament called "the Debts' Recovery (Scotland) Act." Therefore sustains the action, remits the cause back to the Sheriff-Substitute, to proceed therein as to him may seem fit, finds the defender liable to the pursuer in payment of the expenses of process, up to this date. Allows an account thereof to be given in, and when lodged, remits the same to the Auditor of Court to tax and report, and decerns.

Nota.—The Sheriff is unable to view this case as anything but a claim for payment of a specific debt, as the price at so much per head of sixty-five lambs sold and delivered to the defender. Such being the case, it involves no question of accounting depending on some unascertained principle of law or fact. Arithmetic may be necessary to ascertain whether at 7s 6d per head for sixty-five lambs, the claim of £24 7s 6d is correct, but that is not a matter of accounting in the technical meaning of the term. The claim as worded in the summons is probably open to criticism, but the Sheriff views it as meaning substantially a sale transaction, or constructively a sale transaction in respect of the defender *retaining possession of the animals and not remitting the price after a reasonable time, subsequent to delivery.* Fair play, too, must be given to the statute, which was eminently intended, as it expresses, "to make further provision (i.e., in addition to the facilities previously existing) to facilitate the recovery of certain debts in Scotland."

SHERIFF S. D. COURT OF PERTSHIRE.—Sheriff BARCLAY, LL.D.

RATTRAY v. FELL.—Aug. 26.

Fees to Witnesses—Liability of Agents.—The late John Rattray, Esq. of Coralbank, raised an action in the Perth Sheriff Court against Mr James Fell, Heathbank, which was advocated to the Court of Session. The Judges ordered a proof to be taken before one of their number in Edinburgh. Messrs Anderson & Chapman were agents for Mr Rattray, and Messrs A. & R. Robertson for Mr Fell. The agents for both parties cited Mr William Cowan, wright, in Rattray, as a witness in the cause, and he was examined. In consequence of the decision being largely averse to Mr Fell, he declared himself a bankrupt, and Mr Cowan then endeavoured to establish a personal liability against Messrs Robertson, as Mr Fell's agents, for his outlays and charges in attending the proof, which was resisted by them, and the Sheriff has sustained their defence. The leading features of the Sheriff's judgment will be understood by his lordship's notes in the case, which are as follows:—

Perth, 26th August, 1870.—This is a case of some importance alike to the legal profession and to persons called as witnesses in actions at law. In consequence of this the Sheriff-Substitute has obtained the great advantage

of the opinion of the auditor in the Supreme Court. The defenders were agents for a party in the Sheriff Court at Perth. A decision was given against their client, who carried the case to the Court of Session. The Court ordered a proof. The pursuer in this case was cited for both parties. He was precognosed by the defenders for their client, and they instructed an officer to cite him. At the proof he was called as a witness for the defenders' client, but of course cross-examined for the opposite party. The pursuer made no claim against either of the Edinburgh agents nor against the clients; but shortly afterwards he applied to the local agents for both parties. The agents for the party opposed to the defenders' client referred him to the defenders, because though cited by both parties, he was called as a witness for the client of the defenders. It was, however, stated at the pleading that the agents for the other party had agreed to pay one half of the pursuer's claim. The defenders' client having since become bankrupt, they dispute their liability for any part of the pursuer's claim. In the first place, it is abundantly clear that a witness is entitled to be refunded from some quarter his necessary expenses in attending to give evidence at the trial of a cause. The Sheriff-Substitute is of opinion that it is the citation which fixes the liability. The witness comes to Court on that citation. If cited by both parties both can compel his attendance. Though one was to recal his citation he would still be bound to give attendance. If he failed, the penalty would be prestatable by both or by the one who persisted in his attendance. The circumstance of being called by one party is of no importance in shifting liability. He could not be called at one and the same time as a witness for both. But the sooner the better that witnesses realise the fact that they are called as witnesses not for one party as against another, but *for the truth*. It often happens that the evidence of a party called for one party is essentially given for the other. Where a witness is cited for both parties, then both parties are jointly and severally liable in the claim for charges. If the party who is successful in the issue has paid the full sum to the witness, such doubtless would be allowed in the audit. If expenses are found due to neither party, a witness so cited for both parties, but paid by one party, that one would have his claim of relief to the extent of one-half, just as in the case of accountants' reports and other the like acts for mutual benefit. But whilst the claim of the witness as against the parties themselves is undoubted, the question as to the liability of the agents is a very different matter. The liability of the Edinburgh agents for a proof in the Supreme Court does not here arise, though it is understood that in practice such liability is fully recognised. But it is only with the liability of country agents that the Court is now called to deal. If they are liable as principals or guarantees for their clients, then it would follow that an agent citing for his client would be liable for the whole sum due by his client to the witness, and if cited for both parties, then both agents would be jointly and severally liable to the witness, with relief, the one paying against the other to the extent of one-half. But it is not easy to discover the grounds of liability of the country agents for the charges of witnesses attending a trial in the Supreme Court. They are not agents in that Court, and their remuneration connected with such cases is merely illusory. The fact of precognosing the witness has nothing to do with the compulsion of the witness to attend. Many a witness is precognosed but not cited, and as many are cited and examined without any precognition whatever. The agent ordering the citation is also of little consequence. If

admitted, it would form a stronger ground for a claim against the officer citing, who is the proximate cause of the attendance. If either agent ordered a witness to be cited wrongfully and unnecessarily of his own will, or an officer wrongfully cited without instructions, there might arise a claim for redress by the witness, but then on the special ground of *culpa*. But the question raised here is whether country agents are to be held liable to pay the charges of witnesses cited to and examined in the Supreme Court. By the Act of Sederunt, 1839, section 74, but applicable only to Sheriff Courts, it is enacted, that "it shall be in the power of the Sheriff or Commissioners taking the proofs to order to witnesses such expenses as shall seem just to be paid by the party adducing them or his procurator." The necessity of such a provision implies the absence of any common law right. According to the alternative reading of the clause, and understood to be interpreted in practice, the party himself is primarily liable, and the agent is liable only secondarily. In cases where the party is notoriously unable to meet such claims, an agent should see as to the means of paying witnesses before undertaking the agency. It is admitted there exists no authority for the liability of a country agent for witnesses attending in the Supreme Court, and in the absence of such the Sheriff-Substitute cannot perceive legal grounds for the pursuer's present claim. Disputes about payments to witnesses are of frequent and very disagreeable occurrence, and in this the English practice is to be commended, where the citation is always accompanied with the tender of expenses, and without which no warrant as in contempt is granted.

SHERIFF S. D. COURT OF LANARKSHIRE, HAMILTON.—
Sheriff SPENS.

ROBB v. MILLER.—Oct. 7.

Promissory Note—Validity of Subscription by Mark.—The following is the judgment of the S.S.:—

It is a somewhat important point that has been raised in this case in a district where it occasionally happens that men even in a tolerably good way of business are unable to write. Robb sues Miller on a promissory note of £10, to which is adhibited what is alleged to be Miller's X. The objection is taken on the part of Miller that a promissory note authenticated, or attempted to be authenticated, by a X cannot be sued on, and at all events cannot be sued on where there are not subscribing witnesses. As far as I am aware since the passing of the Mercantile Law Amendment Act there has been no decision; but previous to the passing of that Act a series of decisions had established that a X adhibited to a bill or note, as in lieu of the adhibitor's subscription, did not necessarily and *ipso facto* render null and void such bill or note. The first case that I may notice is that of *Cockburn v. Gibson*, 8th December, 1815, F.C. The rubric of that case is "a bill signed by a mark before subscribing witnesses, and where the party admits that he signed it, constitutes a valid obligation, though it cannot authorise summary diligence." And in the previous case of *Stewart v. Russell*, 11th July, 1815, F.C., the Lord Justice Clerk (Boyle) said, with reference to a bill drawn and endorsed by mark, "there must appear on the face of the instrument sufficient legal evidence that the writing was signed before witnesses. I am quite clear that as there is not any mention of witnesses, either as to the indorsation or drawing, the Court cannot listen to it at all;" and the other Judges

concurred, Lord Bannatyne saying, "I have no conception that a person can either discount or accept a bill with nothing but a mark." But the subsequent case of *Kennedy v. Watson*, 25th May, 1816, F.C., appears to have completely altered the law on the subject, and the opinion which Lord Glenlee gave in that case seems, since that date, to have been regarded as the authoritative exposition of the law regarding bills or notes authenticated by mark, unless altered by the Mercantile Law Amendment Act. It is true that the sum contained in the bill disputed in the case of *Kennedy v. Watson* was under the value of a hundred pounds Scots; but although Lord Glenlee undoubtedly refers to this in his opinion, as an additional reason for permitting parole, that is not by any means the ground of his judgment. Lord Glenlee thought "it doubtful whether a bill signed by a mark would of itself warrant decree, but thought that it might be supported in circumstances like the present by proof that the party subscribed." To this opinion Lord Bannatyne and the Lord-Justice-Clerk Boyle gave their adhesion, although the latter said something about the proof merely being before answer. The Justice-Clerk therefore completely swerved round from the opinion so distinctly laid down by him in the case of *Russell*, hardly a year before. This, however, is the only case where subscribing witnesses were held not necessary to give effect to a bill or note authenticated by mark. The subsequent case of *Craigie v. Scobie*, 23d March, 1832, 10 S. 370, is, as far as I am aware, the last case touching the point, and it is referred to by Mr Menzies, p. 343 of his lectures, as shewing that Lord Glenlee's opinion has been acted upon. Lord Meadowbank, in charging the jury, said it was "unnecessary to consider or decide on the general question regarding the necessity of witnesses to the adhibition of a mark, for all the three parties whose names appeared on the bill in question were dead." That point, therefore, was reserved, although it is difficult to see the soundness of Lord Meadowbank's ground of reservation, as the question was whether a bill authenticated by mark without witnesses was not *ipso facto* null. But the case of *Kennedy v. Watson* is the last case on the subject where the point was specially considered (for the case of *M'Intosh v. M'Donald*, Dec. 9, 1828, 7 Shaw 155, although having to do with a mark signed per procuration, was very special in its circumstances) and the authority of the case of *Kennedy* seems never to have been successfully impugned. Bell and Menzies, our most authoritative conveyancers, regard it as ruling the point. As regard acceptances to bills by mark, it seems there can be little doubt now that a bill so accepted is null and void, for the 11th section of the Mercantile Law Amendment Act requires that acceptances of bills shall be in writing, and it is hardly susceptible of argument that a X is writing. This, however, is only applicable to acceptances of bills, and the old law as regards indorsation, drawing bills, and making promissory notes. Mr Bell (vol. 1, p. 434) lays it down that proof is necessary to support a promissory note signed by mark, and I shall require proof next day, (1) either by the admission of the defender or otherwise, that the mark is the genuine mark of Miller; and (2) if, as I understand is the case, there is room for proof of practice, some proof that it is Miller's practice to sign most instruments by mark.

Act.—Brown.—Alt.—Pollok.

English Cases.

MARINE INSURANCE—Constructive total loss—Form of notice of abandonment—Insurable interest—Disbursements.—It is not necessary to use the word "abandoned" in a notice of abandonment; any equivalent expressions which inform the underwriters that it is the intention of the assured to give up to them the property insured on the ground of its having been totally lost is sufficient. The assured must not delay to give notice of abandonment, but sufficient time must be allowed to enable the assured to exercise their judgment whether the circumstances entitle them to abandon. Advances made by the charterer to the master at the port of loading to be repaid by deductions out of freight, give the charterer an insurable interest in a policy on disbursements. The appellants chartered a vessel for a voyage, and insured the cargo against total loss. In the course of the voyage the vessel went aground, became hogged, and sustained other injuries, and surveyors recommended her to be stripped with dispatch, and steps taken to save the cargo, but no attempt was made to do so; and after several days the master, fearing bad weather, sold the vessel and cargo for the benefit of all concerned. The vessel remained for some days in the same state, and the weather proving fine, the purchasers saved a large part of the cargo:—*Held*, that the appellants were not entitled to treat the cargo as having been totally lost.—*Currie & Co. v. Bombay Native Insurance Co.*, 39 L. J. P. C. 1.

BOTTOMRY—Advances—Subsequent bottomry bond.—A. & Co. agreed to purchase at Akyab cargoes of rice for F. & Co., A. & Co. to be secured by hypothecation of the bills of lading and a fixed freight of 5s. per ton. Whilst the ship E. P. was loading one of the cargoes, A. & Co. advanced about £540 for ship's disbursements, but upon hearing that F. & Co. had stopped payment, induced the master to execute a bottomry bond both for the advances already made, and also for a further sum of small amount:—*Held*, that the first advances were made partly upon personal security and partly upon the margin of freight, and could not therefore be secured by a subsequent bottomry:—*Held* also, that the further advances were too trivial to render the bond valid with respect to them.—*The Empire of Peace*, 39 L. J. Adm. 12.

MARINE INSURANCE—Policy on freight—Inception of risk—Insurance at and from port.—A ship, described as "lying in the harbour of Bombay," was chartered in August, 1866, to take a cargo from Howland's Island to Great Britain; the ship to be at Howland's Island on or before the 1st of June, 1867. The shipowners in September, 1866, effected a policy on the vessel "at and from Bombay to Howland's Island, whilst there, and thence to any port or ports, place or places of call, and discharge in the United Kingdom." The insurance was on freight "chartered or otherwise." The ship left Bombay for Howland's Island, in October, 1866, in ballast, but before arriving there, sustained such injury from perils of the sea, that it became necessary to abandon the voyage under the charter-party:—*Held*, that the assured were entitled to recover as for a total loss of the freight, for the ship, though not actually bound to do so, had left Bombay for the purpose of fulfilling the charter-party, and had thereby taken a step and incurred expense in earning the chartered freight, so as to give the assured

a sufficient interest in the subject matter of insurance.—*Barber v. Fleming*, 39 L. J. Q. B. 25.

WILL—*Construction of—Substitutionary gift*.—Gift of residue to trustees upon trust to pay the income to testator's daughter for life, and subject thereto to distribute one-fourth part thereof equally between his nephews and nieces, the children of his deceased sister, with a direction that in case of the death of any of his said nephews or nieces leaving issue, such issue should take the share that his, her, or their deceased parent would have taken if living:—*Held*, by Malins, V. C., that the issue of all nephews or nieces who died in testator's life time, whether before or after the date of the will, took by substitution. *Christopherson v. Naylor* (1 Mer. 320) overruled; *Stewart v. Jones* (3 De G. & J. 532) questioned.—*In re Potter's Trust*, 39 L. J. Ch. 102.

CONTRIBUTORY—*Conditional contract to take shares*.—S. offered to take shares in a company in consideration of his being secured a contract for adding to and altering the company's premises. The directors passed a resolution to give him the contract, and on the faith of such resolution he sent a formal application for shares without condition, and paid the deposit. The shares were allotted, and notice of the allotment was sent to S., and his name was entered on the register; but the certificates were never delivered nor was S. required to pay any calls. The contract was never given to S. on account of the winding up of the company:—*Held* (aff. decision of Master of the Rolls), that there was a contract to take shares by S. only on condition of his obtaining the building contract, that that condition had not been fulfilled by the company nor waived by S., and that therefore S.'s name must be removed from the list of contributories.—*In re Aldborough Hotel Co.; Simpson's case*, 39 L. J. Ch. 121.

COMPANY—*Liability of past members—Forfeited shares*.—The person, who was the owner of shares which have been forfeited, may be put upon the list of contributories as a past member, whether he was owner of the shares at the time they were forfeited, or previously, if within one year of the date of the winding up. For the purpose of considering the liability of past members forfeiture and transfer are equivalent.—*In re Blakeley Ordnance Co.; Creyke's Case*, 39 L. J. Ch. 124.

CONTRIBUTORY—*Compromise ultra vires*.—In 1846 D. became a shareholder in an unlimited company, upon the faith of a promise by W., the local manager, that he should not become responsible as a shareholder until an Act of Parliament should be passed incorporating the company with limited liability. D. never paid any calls upon his shares, all calls being paid by W.; but he acted as a shareholder in some particulars. No Act, such as that alluded to, was ever passed. Upon D.'s application that his shares should be cancelled, the directors in 1848 passed a resolution to cancel the shares. Such a resolution by directors was *ultra vires*, but no steps were taken by the company to enforce D.'s liability as a shareholder, and for twenty years D. held no communication with the company. In 1869 the official liquidator (the company being then in course of winding up), sought to place D. upon the list of contributories:—*Held*, on the authority of *Spackman v. Evans*, *Houldsworth v. Evans*, and *Stanhope's case*, that D. must be placed upon the list of contributories.—*In re Agriculturist Cattle Insur. Co.; Dixon's case*, 39 L. J. Ch. 134.

COPYRIGHT—*Registration—Newspaper—Injunction*.—A newspaper is not a "book" within section 2 of the Copyright Act (5 and 6 Vict., c. 45)

nor a periodical under section 19, and therefore need not be registered under section 24 in order to enable the proprietor to sue for an infringement of copyright; the modified property conferred upon him by section 18 in any contribution to his paper for which he has paid, will, without registration, be sufficient to enable him to maintain a suit. An injunction to restrain the piracy of a list published in a newspaper will be refused on interlocutory application, where the information supplied by the list is to be easily obtained, and where the Court would be unable to decide whether it had been properly obtained or not. *Semble*—that in this case an injunction would also be refused at the hearing and an inquiry ordered as to damages.—*Cox v. Land and Water Journal Co.*, 39 L. J. Ch. 152.

DEBENTURE—Company—Priority.—A debenture holder, in whose favour the undertaking of a company is charged, although he cannot come upon the assets and property of the company so long as it is a going concern, yet upon its stoppage and the sale of its property has a lien on the proceeds in priority to general creditors. [See *Furness v. Caterham Ry. Co.*, 27 Beav. 358.]—*In re Panama, New Zealand and Australian Royal Mail Co.*, 39 L. J. Ch. 162.

MINING LEASE—Dead Rent—Covenant to work—Specific performance.—The lease of coal mines, which were capable of being worked by instroke from adjoining mines, reserved a minimum rent and royalties in the usual manner, but contained a proviso that in case of pits being sunk the minimum rent was to be increased. It also contained a covenant on the part of the lessee to work, "uninterruptedly, efficiently, and regularly, according to the best and most approved mode:"—*Held*, by Malins, V. C., that under the circumstances, although the most approved mode of working was by sinking pits, the lessees were not bound to sink them; that the lessees were not bound to work so as to produce royalties in excess of the minimum rent; and that this Court would not grant an injunction to restrain the lessees from breaking their covenant.—*Wheally v. The Westminster Brymbo Coal and Coke Company (Lim.)*, 39 L. J. Ch. 175.

LIBEL—Privileged Communication—Military Discipline—Malice.—A military person cannot maintain an action against his superior officer in respect of anything done by such superior officer in the discharge of his military duty, but must follow the special mode of redress pointed out in the Articles of War. To an action brought by a captain in a regiment of the foot guards against the major-general commanding the brigade of foot guards, for an alleged libel contained in certain reports written by the defendant and sent by him to the adjutant-general of the army, the defendant pleaded that it was his duty, as the plaintiff's superior military officer, to write and forward, for the information of the commander-in-chief, such reports relating to the military conduct, duties and qualifications of the officers under him, and that the reports in which the alleged libels were contained were made by him in the ordinary course of his military duty as such superior military officer, and not otherwise, or for any other reason. To this plea the plaintiff replied that the words in the declaration mentioned were published by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of the defendant's duty as the plaintiff's superior military officer. On demurrer to the replication, *Held* (per Mellor, Lush, and Hayes, J.J., *dissentiente* Cockburn, C.J.), that the replication was bad, and furnished no answer to the plea. Per Cockburn, C.J.—The replication was good, and an

answer to the plea. Though acts done in the honest exercise of military authority are entirely privileged, yet if the opportunity it affords is intentionally abused for the purpose of injury and wrong, the person wronged, though a soldier, is not debarred from obtaining redress in a court of law. Per Mellor, J.—The motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be.—*Dawkins v. Pauld*, 21 L. T. Rep. N. S. 584; 39 L. J. Q. B. 53.

SUCCESSION DUTY—16 and 17 *Vict.*, c. 57.—The proviso in s. 42 applies to a case where the power of sale relates to the successor's estate only, and does not over-reach the antecedent estate, upon the determination of which succession duty will become payable. Real estates were settled on R. B. for life, with remainder to the use that his wife, A. B., should receive a jointure thereout, with remainder to the use of trustees for a time to secure the jointure, with remainder to the use of the first and other sons of R. B. in tail male. R. B. and his eldest son, H. B., joined in barring the entail, and resettled the estates, subject to the prior uses and charges, including A. B.'s jointure, in strict settlement, upon H. B. and his issue in tail male. This last settlement contained a power for the trustees to sell the settled estates, and provided for the re-investment of the price in other estates to be settled to the uses of the settlement. Upon a sale, free from incumbrances, of a portion of the settled estates, after the death of R. B., by A. B., the jointress, H. B., the then tenant for life, and the trustees of the last mentioned settlement, in exercise of their power, the purchaser claimed to be indemnified by the vendors against the succession duty, which would become payable by the extinction of the jointure of A. B. on her death, and in default of such indemnity refused to complete the purchase:—*Held*, by James, V.C., that no duty whatever could be imposed on the purchase under s. 20 of the Act, and that the duty payable on the death of A. B. on the extinction of her jointure would, under s. 42, be a charge on the proceeds of the sale or the substituted real property. The purchaser, therefore, was bound to complete the sale without such indemnity.—*Drysdale v. Meadows*, 39 L. J. Ch. 180.

MARINE INSURANCE—*Valued policy*—*Right of underwriter to damages recovered by assured*.—Where a vessel insured by a valued policy is destroyed by collision, the underwriters, after paying the amount insured, are entitled to the damages recovered from the colliding vessel, although the amount insured by the policy is less than the actual value of the vessel insured. Plts. subscribed a policy valued at £6,000 on defts.' vessel. Pending the risk this vessel was sunk by a collision. Plts. paid defts. £6,000, and proceedings having been taken in the Admiralty against the colliding vessel in the name of defts., a sum exceeding £5,000 was recovered as damages. The vessel insured was really worth £9,000 at the time she was lost:—*Held*, that the valuation in the policy was conclusive, so that the whole of the damages recovered must be regarded as salvage, and would pass to plts.—*North of England Iron Steamship Insur. Assoc. v. Armstrong*, 39 L. J. Q. B., 81.

NEGLIGENCE—*Fire spreading from combustible materials on banks of the railway*.—In an action charging that by the negligence of the defts. in the management of their railway engines and banks, cut grass, etc., was heaped on the banks and ignited, and a fire occasioned, which spread along a stubble

field to the plt.'s cottage and set it on fire,—it appeared that, the summer being exceptionally hot, the country in an unusually dry and combustible state, and fires in consequence happening, the hedges and grass on the banks of the railway had been trimmed, and the trimmings left on the banks for a fortnight, so as to become highly combustible; that some hours before the accident the defts.' workmen were seen burning these trimmings about half a mile from the spot where the fire originated, and working towards it, that a short time before the fire broke out these men were finishing their dinner and smoking on the bank opposite to the spot; that a train passed and shortly afterwards the fire begun; that these men (who must have been on the spot, and were not called by the defts.) tried in vain to put it out; that it burned through the hedge, and there being a high wind, ran for 500 yards diagonally across a stubble field and set fire to the plt.'s cottage, which was separated from the field by a lane, and was distant from the nearest part of the railway about 200 yards, and from the spot where the fire originated about 500 yards:—*Held* (per Bovill, C.J., and Keating, J.; dissentiente Brett, J.), that there was evidence of negligence to go to the jury.—*Smith v. London and South-Western Rail. Co.*, 39 L.J., C.P., 68.

DAMAGES—Proximate cause—Acts of independent parties conjointly causing damage—Contributory negligence.—Defts., a gas company, having contracted to supply plt. with a service pipe from their main to the meter on his premises, laid down a defective pipe from which the gas escaped. A workman, in the employ of a gasfitter engaged by plt. to lay down the pipes leading from the meter over the premises, negligently took a lighted candle for the purpose of finding out whence the escape proceeded. An explosion then took place, whereby damage was occasioned to the plt.'s premises, to recover compensation for which plt. brought his action against defts.:—*Held*, that the damage was not too remote, and that plt., not being the master of the workman, could not be considered as contributing to the damage by reason of his act, and was therefore entitled to recover.—*Burrows v. The March Gas and Coke Co.*, 39 L.J., Ex. 33.

STAMP DUTY—Exemption—Friendly society—Transfer of mortgage.—A transfer of mortgage made to a Friendly Society is not exempt from stamp duty, under the 18 & 19 Vict., c. 63, s. 37, although such society is empowered by its rules to invest surplus funds on mortgage.—*Trustees of the Royal Liver Friendly Society v. Commissioners of Inland Revenue*, 39 L.J. Ex. 37.

STAMP DUTY—Lease “further and other valuable consideration”—Covenant to complete house on demised land.—A covenant by a lessee—to whom land is demised in consideration of the rent and covenants reserved and contained in the lease—“to complete and make fit for use in every respect a messuage on the land demised, with all necessary fixtures, etc., to the satisfaction of the lessor,” is “a further and other valuable consideration” within the meaning of the 16th section of 17 and 18 Vict., c. 83; and such lease is therefore chargeable with the duty of 35s., in addition to the *ad valorem* duty on the rent reserved.—*Boulton v. The Commissioners of Inland Revenue*, 39 L.J. Ex. 51. (See, however, 33 & 34 Vict., c. 44, *supra*, p. 554.)

CARRIERS' ACT.—If a package containing pictures in frames exceeding £10 in value be delivered to a carrier to be delivered for hire without declaration, under s. 1 of the Act as to the value and nature of the articles, picture and frame are to be considered as one article; and the carrier is protected by the Act from liability for damage done to the frame as well as damage done to the picture itself.—*Anderson v. L. & N. W. Ry. Co.*, 39 L.J. Ex. 55.

EMBEZZLEMENT—*Prosecution by illegal society*.—A society in the nature of a friendly society, but having rules—(not enrolled or certified under the Friendly Societies Acts)—certain of which are in restraint of trade, and therefore void, is not an illegal society in the sense that it is disabled from prosecuting a servant for embezzlement.—*Regina v. Stainer*, 39 L. J. Mag. Ca. 54.

COMPANY—*Transfer of shares to a trustee to escape liability*—*Costs*.—Where a holder of shares in a company, which were quoted in the market at a large discount, transferred the shares to a person of unsubstantial means, apparently intending to retain control over them, although the transfer purported on its face to be made upon a sale:—*Held*, on the company being subsequently wound up, that the transferor ought to be held liable on the shares; and on an application made under s. 35 of the Companies Act, 1862, the transferor's name was restored to the register of members. In such a case, the Court has, by virtue of the winding up, jurisdiction to award costs against the transferor who resisted the application. The application in such a case should in form be made by the company, and not by the official liquidator.—*In re the Bank of Hindustan, China, and Japan, Kintrea's case*, 39 L. J. Ch. 193.

VACCINATION—30 and 31 Vict., c. 84, s. 31—*Certificate of medical practitioner*.—On the 30th of March, 1869, A. was convicted for disobeying an order of a justice to cause his child to be vaccinated within seven days from the date of such order. Subsequently the registrar of births and deaths gave him notice to procure the vaccination of his child, which he failed to do; and on the 29th of April, another information came on to be heard against him, when he was ordered to have the child vaccinated within seven days from the date of such order. At the hearing he produced a certificate in the form given in schedule B to the Act, and signed by a medical practitioner, certifying that the child was not in a fit state to be vaccinated, and postponing the vaccination until the 20th of June. He did not obey the order made upon him, and on the 13th of May, 1869, another information under 30 & 31 Vict., c. 84, s. 31, came on to be heard against him for disobedience of such order. He again produced the certificate above mentioned, but he was convicted:—*Held*, first that the justices were not deprived of the jurisdiction to convict him, by reason of the former conviction; and secondly, that the certificate was not a bar to the proceeding, but that the justices had jurisdiction to consider whether it was given *bona fide* or not, and that if they thought it was not, they might consider that A. had shown no reasonable ground for his omission to carry the order into effect.—*Allen v. Worthy*, 39 L. J. Mag. Ca. 36.

CONTRIBUTORY—*Transfer to avoid liability*—*Repudiation of contract by infant*.—A transfer of shares was made to an infant, being also a person of no means, for a nominal consideration. Three years afterwards the company was wound up voluntarily. The court refused to place the executors of the transferor on the list of contributories. An infant transferee of shares can only repudiate them within a reasonable time after coming of age, if the company is a going concern.—*Re the Norwegian Charcoal Iron Co. (Lim.)*; *Mitchell's case*, 39 L. J. Ch. 199.

ANNUITY—*Grant of annuity to secure loan*—*Policy effected by grantee on life of grantor with his money*—*Re-purchase of annuity*.—There is no trace of a general rule that where the grantee of an annuity insures the life of his granter, the policy effected belongs to the grantee. The grantee of an

annuity, covenanted to be paid to him in consideration of a sum of money advanced by him to the grantor, insured in his own name the life of the grantor, the annuity having apparently been calculated so as to cover the amount of premium for such assurance if effected. The grantor, in pursuance of the contract, duly re-purchased the annuity, and extinguished by payment all his obligations to the grantee:—*Held*, by Stuart, V. C., that the policy effected on the life of the grantor, and the bonuses thereon, were the property of the grantee of the annuity. *Gottlieb v. Cranch*, 4 De G. M. & G. 440, 22 L. J. Ch. 912 observed upon.—*Knox v. Turner*, 39 L. J. Ch. 207.

WILL—Discretion of trustees—Annuity—Equivalent value.—By will a sum was given to two trustees on trust to pay the income to C. for his life, with a gift over the principal on his death; but the trustees had a discretionary power to purchase with the principal an irredeemable annuity for the life of C. for his benefit. The trustees did not purchase an annuity, but one of them paid to C. during his life from time to time various small sums, amounting in the aggregate to more than the total income, but less than the principal:—*Held*, per L. Romilly, M. R., that this was a proper exercise of the discretionary power.—*Messeena v. Carr*, 39 L. J. Ch. 216.

TRADE MARK—Misrepresentation—Patent thread.—The word “patent,” having come to be applied in common language to various manufactured articles as descriptive of a particular quality, without any reference to letters patent, the use of the words “patent thread” as part of the trade mark on an unpatented article, will not prevent a Court of Equity from protecting such trade mark.—*Marshall v. Ross*, 39 L. J. Ch. 225.

CONTRIBUTORY—Forfeiture of shares—Ultra vires.—The owners of mines formed in 1835 a joint-stock company for working the mines by dividing the mining property into a certain number of shares, and after distributing a part of such shares amongst themselves, allotting the remainder to the public at £40 per share, payable by instalments to the said owners. The deed of settlement of the company provided for the forfeiture of the shares on non-payment of the instalments due thereon, and reserved powers for increasing the capital of the company by augmenting the amounts of the shares, and for altering the articles of the company. Under a subsequent deed the share certificates were made transferable by delivery. In 1866, in order to raise additional capital of the company, and with the view of having the company registered as a limited company, resolutions were passed by general meetings of the company, that the amount of the existing shares should be increased by £10 per share, payable by instalments, and in default of payment, that the share should be forfeited, and that the holders of share certificates should return their certificates, with their names and addresses, before a given day, or in default that their shares should be forfeited. The holders of a number of shares did not send in their certificates by the day named, and their shares were accordingly declared forfeited. The company was shortly afterwards registered as a limited company, the list of shareholders sent in to the registrar comprising the names of those only who had sent in their certificates in compliance with the above resolution. On the company being subsequently wound up:—*Held*, by James, V. C., that the shares of the members of the old company who had not sent in their certificates had been effectually forfeited, and they were not liable to be placed on the list of contributories to the new company.—*In re the Royal Copper Mines of Cobre Co., Kell's case, and Pahlen's case*, 39 L. J. Ch. 231.

CONTRIBUTORY—*Register of shareholders*.—A. sold shares on the Stock Exchange; the name of B., who had not bought them, was given as that of the ultimate purchaser. A. executed a transfer to B., whose name was placed on the register of shareholders, though he had not executed the transfer. B. compelled the company to remove his name. Afterwards the company was wound up. A. was made a contributory.—*Re Merchants' Co., Heritage's case*, 39 L. J. Ch. 238.

POWER OF APPOINTMENT—*Bargain with the Appointee*.—Judgment of Vice-Chancellor, ante, p. 535, affirmed.—*Cooper v. Cooper*, 39 L. J. Ch. 240.

ASSURANCE COMPANY—*Novation of Contract with Policy-holder*.—B., a policy-holder in the C. office, having knowledge that it had transferred its business to the D. office which had subsequently transferred it to the E. office, paid the premiums on his policy from 1858 to the D. office until the dropping of the life in 1869. This was held to be a novation of the contract. But when X. had an annuity granted by the C. office in 1854, and had notice of both the transfers of the business, and received his annuity for thirteen years from the E. office, without objection it was held not to be a novation of the contract.—(*Re National Provincial Life Assurance Society*, 22 L. T. Rep. N. S. 465, 39 L. J. Ch. 250).

NUISANCE—*Sewerage local act*—*Incorporation of public act*—*Information*.—A corporation was by a local Act empowered to drain all their sewage into a specified river. The local Act incorporated the clauses of the Towns Improvement Act "relating to the making of sewers." The section of the Towns Improvement Act which provides against the creation of nuisances is not one of the clauses included under the heading, "With respect to making public sewers," but is one of the general sections at the close of the Act.—*Held*, that the general section relating to nuisances was incorporated with the local Act, and prohibited such drainage into the river as would create a nuisance.

An information was filed at the relation of persons living on a river complaining of the nuisance caused by the sewage of the neighbouring towns. The nuisance to the relators was proved, but it was in evidence that if the nuisance was stopped, the health of the inhabitants of the town, whose number greatly exceeded the sufferers by the nuisance, would be endangered.—*Held*, by James, V. C., that the Court could not interfere with the Attorney-General's discretion, nor consider the balance of inconvenience.—*Attorney Gen. v. Mayor of Leeds*, 39 L. J. Ch. 254.

INSURANCE COMPANY—*Breach of contract*—*Damages*—*Premium*.—The winding up of an insurance company renders it impossible for the company to perform its contract with the policy-holder, who is therefore entitled to claim damages for the breach of such contract; and such claim is unaffected by the non-payment on his part of the premiums payable after the presentation of the petition. And *Seemle*, the damages will be measured by the additional amount which the policy-holder would have had to pay, in order to effect a fresh insurance of the same sum at the same premium, at the date of the winding up order.—*In re Albert Life Assurance Co.; Cooke and Edwards' case*, 39 L. J. Ch. 257.

POWER OF APPOINTMENT—*Fraud on Power*—*Second Appointment*.—When an appointment, valid on the face of it, has been set aside by reason of what has taken place between the donee of the power and the appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the appointee that

the second appointment is perfectly free from the original taint which attached to the first.—*Topham v. Duke of Portland*, 39 L.J. Ch. 259.

RAILWAY COMPANY—*Money borrowed ultra vires*—*Lloyd's bonds*—*Acquiescence of shareholders in application of money so raised*—*Illegality*.—The directors of a railway company which had exhausted its statutory borrowing powers, issued, with the consent of the shareholders given at a general meeting, instruments under the seal of the company, acknowledging sums of money as due from the company in the form called "Lloyd's bonds." With part of the money so raised they paid off some of the simple contract debts of the company. The railway was subsequently sold:—*Held*, that so far as the company had adopted the proceedings of the directors, and the money raised on the Lloyd's bonds had been applied in paying off the legitimate debts of the company, the holders of the bonds stood in the place of those whose debts had been so paid off, and were entitled to the surplus assets in preference to the shareholders of the company. Per *Giffard, L.J.*—A contract or instrument which fails in a Court of law by reason of its illegality will not be enforced in equity because money has been paid and received in respect of it. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks: but as to any claim sought to be actively enforced, the defence of illegality is as available in a Court of Equity as it is in a Court of law.—[Note for Reference: *Chambers v. Manchester and Milford Ry. Co.*, 33 L.J. Q.B. 268; 5 B. & S., 588.]—*In re Cork and Youghal Rail. Co.*, *Ex parte Overend, Gurney & Co. (Lim.)*, and *London, Hamburg, and Continental Exchange Bank*, 39 L.J. Ch. 277.

TRADE MARK—*Name of firm*—*Laches*.—Plaintiffs were in August, 1869, and had for some time previously, been carrying on business under the style of The Guinea Coal Company, their offices being at No. 22, Pall Mall. In the early part of 1869, deft., who had formerly managed the plt.'s business, established a business on his own account under the style of The Pall Mall Guinea Coal Company; his offices being first at Beaufort Buildings, whence, in August, 1869, he removed to No. 46, Pall Mall. Deft. solicited orders principally by circular, sending circulars to many of plt's. customers, and, as the evidence shewed, succeeded in obtaining orders, which the customers afterwards said they had intended for plt's.:—*Held*, that plt's. were entitled to restrain deft. from using the name "The Pall Mall Guinea Coal Company" in Pall Mall.

Defendant, amongst other grounds of defence, set up a case that plaintiffs habitually served short weight upon their customers, and deceived their customers also in the character of the goods supplied: *Semble*, if these allegations had been supported by the evidence, which was held not to be the case, they would have disentitled plaintiffs to come to this court. The bill was filed on Nov. 24, 1869:—*Held*, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected.—*Lee v. Haley*, 39 L.J. Ch. 284.

DAMAGES—*Misrepresentation of authority to sell land*—*Statute of frauds*—*Telegram*—*Authority to sell*—*Advertisement*.—Deft. professing to be agent for the owners (he being one of them) of an estate, entered into a contract of sale of it to plt.; some time afterwards he wrote to say that there had been some misunderstanding, that he thought he was authorised to sell, but that it appeared that the parties interested took a different view; the owners refused to complete, and sold the estate for a larger sum than that

offered by plaintiff; plaintiff then brought an action against the owners, when, in answer to interrogatories, they (including deft.) swore there was no authority, but plaintiff still prosecuted the action on the ground that an advertisement, stating that to treat and view the property applications were to be made to deft., was sufficient authority, and was nonsuited; he then brought an action against defendant for misrepresentation of authority:—*Held*, that he was entitled to recover as damages, first, the cost of investigating title; secondly, the costs of the previous action up to the time of the answers, and a reasonable time to consider them, but not beyond; thirdly, the difference between the contract price and the market value, of which the price for which the estate sold was *prima facie* evidence; but could not recover loss on cattle, etc., bought in contemplation of the completion of the purchase. Where, in answer to an offer to buy land, written and signed instructions of acceptance are given in the usual way to a telegraph company to be telegraphed, and a telegram is sent in the usual way in accordance therewith, there is a sufficient contract in writing within the Statute of Frauds. An advertisement of sale of real estate, stating that to treat and view the property applications are to be made to certain named persons, does not hold them out as authorised to enter into a contract of sale.—*Godwin v. Francis*, 39 L.J. C.P. 121.

CARRIERS BY RAILWAY—*Lien for charges*.—The word “tolls” in s. 97 of the Railway Clauses Act, 1845, does not mean charges for the conveyance of goods by the railway company in their carriages, but only charges for the use of the company’s line by persons conveying their own goods over the line in their own carriages; and therefore the railway company has no right, by virtue of the 97th section, to detain or sell goods on their premises delivered to them for conveyance, merely because the owner has failed to pay charges previously incurred in respect of the conveyance by the company of other goods for him.—*Wallis v. L. and S.-W. Rail. Co.*, 39 L.J. Ex. 57.

LEGACY DUTY—*Money bequeathed to trustees to be laid out in land*.—Though a fund bequeathed to trustees to be laid out in land, but not actually so laid out, may be treated by the Court of Chancery as land for some purposes, the fund is not, while the trusts of the will remain undischarged, to be so treated for the purposes of the Succession Duty Act. Under a will made in 1799 C. and J. enjoyed successively life interests in a fund which was directed by the will to be laid out in land. On the death of J., S. became absolutely entitled to the fund under the provisions of the will; and on the death of S., E. took the fund as heir-at-law of S. Neither C., J., nor S. had dealt with the fund in any way, and it had never been invested in land:—*Held* (aff. decision of Court of Exch., *ante*, p. 585), that E. was chargeable with legacy duty under 36 Geo. III., c. 52, s. 19, and not with succession duty.—*De Lancey v. Commissioners of Inland Revenue*, 39 L.J. Ex. 76.

WILL—*Construction*—*Property or power*—*Limited power of appointment*—*Exercise of by residuary bequest*.—Testator directed his residuary estate to be equally divided among all his children, and proceeded to direct each of his children’s shares to be invested, and the dividends to be for their own use during their respective lives, with power to dispose of the principal among their children, if any, and if none, the share to sink into the residuum for the benefit of the survivors:—*Held*, that each child took a life interest only in its share, with a power of appointment amongst its children if any. A testatrix, having a life interest in a trust fund, with a power of

appointment among her children, made her will, and thereby, after reciting the power, made an appointment which did not exhaust the whole fund; and after some specific and pecuniary legacies to persons not objects of the power, and a direction to pay debts, etc., she gave the residue of her personal estate which should belong to her at her decease, or which by virtue of any general power she was able to dispose of, to an object of the power:—*Held*, rev. decision of Malins, V.C., that the residuary bequest was not an exercise of the power.—*Butler v. Gray*, 39 L.J. Ch. 291.

INSURANCE COMPANY—*Transfer of business*—*Contract of policy*—*Novatio or guarantee*.—The holder of a policy in company A. received a circular stating that it was “dissolved,” and its business and assets had been transferred to company B., and that he was entitled to have his policy exchanged for a new one in company B., or to have an endorsement by company B. on the old policy, “guaranteeing the fulfilment” of the old policy. He accepted the latter alternative, and obtained an endorsement, charging the assets of company B. with the payment of the old policy:—*Held*, that he had accepted the liability of company B. in lieu of, and not as surety for, that of company A.—*Re International Life Assurance Society and Hercules Insurance Company, ex parte Blood*, 39 L.J. Ch. 295.

INSURANCE COMPANY—*Amalgamation*—*Policy-holders' petition*—*Novatio*.—The deed of settlement of the T. Life Assurance Company provided that the company might be dissolved by resolutions of the shareholders; that on such dissolution the claims and demands of the company arising from assurances, etc., should be paid by the company, or undertaken to be paid by another assurance company, to which the T. Co. might transfer its property; and until the said claims were so “satisfied and provided for,” the duties of the directors and the shareholders to make calls, hold meetings, etc., should continue. In pursuance of these provisions, the T. Co. was dissolved, and its business and liabilities were transferred to the A. Co. Circulars announcing the “amalgamation” of the T. Co. with the A. Co. were issued to the policy-holders in the T. Co. Thirteen years after this amalgamation, the A. Co. fell into difficulties and was wound up. The assignee of a policy-holder in the T. Co. then presented a petition to have that company wound up. The policy was expressed to be subject to the provisions of the company's deed of settlement, and to the premiums being paid to the T. Co. After the amalgamation of the two companies, the policy-holder and the petitioner had paid the premiums on the policies to the A. Co., and the former had received a bonus thereon from the A. Co.:—*Held*, that this case was different from that of the *Family Endowment Company, infra*, and that there was here a complete novatio with the A. Co., and the petition for winding up must be dismissed with costs.—*In re The Times Life Assurance and Guarantee Company, ex parte Nunneley*, 39 L.J. Ch. 297.

WINDING-UP—*Insurance Co.*—Inability to pay debts within the meaning of the Companies' Act, 1862, s. 79, s. 4, refers only to debts absolutely due, for which a creditor can demand instant payment. In considering whether it is just and equitable, under s. 5 of the same Act, that a company should be wound up, the Court has nothing to do with future liabilities, or with the question of the probability that the business will be profitable or unprofitable, but will look only to the present solvency or insolvency of the company. (But see 33 & 34 Vict., c. 61, *supra*.)—*In re European Life Assurance Society*, 39 L.J. Ch. 324: (James, V.C.)

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A TRANSLATION OF THE TITLE OF THE PANDECTS AD LEGEM AQUILIAM—(IX. 2).

(Continued).

XI. *Ulpianus, l. lviii., ad Ed.*—So also, Mela writes that if, when people are playing at ball, one of them should strike the ball too violently and hurl it against the hands of a barber, so that the throat of a slave whom the barber is shaving is cut by the razor being thrust against it, he who is in fault is liable by the Aquilian law. Proculus says that the fault is the barber's. And certainly if he plied his trade where there was a custom of playing, or where there was a thronged thoroughfare, some blame attaches to him; yet* it may reasonably be said that, if any one commits himself to the hands of a barber who has his stall in a dangerous place, he has himself to blame.†

* "*Quamvis*"—an ambiguity has been detected in this word. The meaning of Ulpian will differ according as we take the "*quamvis*" to continue and enforce his statement of the opinion of Proculus, = "notwithstanding that;" or to introduce another view at variance with it, = "Yet," marking in the latter case the beginning of a new sentence. The latter construction appears to be supported by the analogy of *l. 9, s. 4, supra*; though some, founding on *l. 1, s. 5; l. 28, D. de injur* (47, 10), deny that such a voluntary act of a slave can prejudice the right of the master to reparation. These texts do not, however, apply to the Aquilian law.

† The same distinction between public and private places is made in the modern cases. An action lies for digging a hole in the highway and leaving it without any light or signal, *Newton v. Ellis*, 5 E. and B. 115; *Innes v. Mags. of Edin.*, M. 13, 189; or so near the highway as to render it unsafe to those who use it with ordinary care, *Black v. Caddell*, M. 13, 905. But in general a person is not liable in respect of open excavations on his own land at a distance from the public road, *Hardeastle v. South York Ry. Co.*, 28 L. J. Ex. 139; although the land be waste and open to the public, *Hounsell v. Smyth*, 29 L. J. C. P. 203; and although it is used with permission of the owner, *Barker v. South York Ry. Co.*, 32 L. J. 2 B. 26. "He must accept the permission with its concomitant conditions, and it may be attendant perils," per Williams, J., in *Hounsell's case*. The Scotch case of *Hielop v. Durham*, 14th March, 1842, 4 D. 1168,—where a woman running away from her companions in a dark night, and crossing a field, fell into an unfenced pit, for which the owner was held liable—has sometimes been misunderstood. It was explained by the Court in *Balfour v. Baird*, 5th Dec., 1857, 20 D. 238. A private road led past the pit, and therefore it was held that it should have been enclosed. The English and Scotch cases thus agree. It has also been decided in both countries, that

§ 1. If one held, and another killed, he who held is subject to an action *in factum*, as having given occasion of death.

§ 2. But if several struck the slave, let us see whether all are liable as having killed him? If it appears by whose blow he perished, that person is liable as having killed him; but if it does not appear, Julianus says that all are liable. And if one be sued, the others are not released; for what one pays under the *lex Aquilia* does not relieve another; for it is a penalty.*

§ 3. Celsus writes that if one mortally wounds, and another afterwards completely kills a slave, the former is liable not for killing, but for wounding; because he died of another wound; but that the latter is liable for killing—which is also the opinion of Marcellus, and is reasonable.†

§ 4. If several persons have thrown down a beam and crushed a man, the ancients are also agreed that all are liable under the Aquilian law.

the owner of premises is bound to use reasonable care to protect persons coming to them by his invitation or upon business, from unusual dangers which he knows or ought to know to be there. *Indermaur v. Dames*, L. R. 1 C. P. 374, 2 Ib. 311; *Seymour v. Maddox*, 16 Q. B. 326; *Southcott v. Stanley*, 1 H. and N. 247; *Bolch v. Smith*, 31 L. J. Ex. 201; *Corby v. Hill*, 27 L. J. C. P. 318. In accordance with these cases the question stated in the text will now turn on whether the place is, through dedication or otherwise, suitable for playing at ball. If it is, then the injury will be held to be due to the imprudence of the person who sought out the danger, and not to the innocent striker of the ball. *DOMAT*. 2. 8. 4.

* Cf. *l. 51, s. 1, 2, infra*. "For it is a penalty." If the animal killed had been more valuable at any time within a year (or thirty days) than it was at the moment when killed or wounded, the defender had to pay more than the amount of damage actually done, so that the action became penal. In actions the object of which was the recovery of a penalty (*actiones poenales, poenae persequendae causa comparatae, etc.*) for an act committed by several persons jointly, there was no *concursum actionum*; that is, the recovery of the penalty from one did not "consume" the right of action against the others: they were not thus released, "*cum sit poena*," says Noodt, "*id est cum poenam solvat, sed suam*." It will be observed that the Aquilian action could only be partially penal, and it might be supposed, from the analogy of other mixed actions that damages or reparation could be demanded only once, and that all the parties could be called on only for the penal addition to this amount. "But the law allowed the injured party to proceed against each delinquent as if his action had been done not now, but at any past moment of the last year. By this fiction, each delinquent is dealt with as at a time when no other was his codefendant, so that he must pay the full amount." *SAVIGNY, System*, v. 235. See *STAIB*, i. 9, 5.

† *CUJACIUS* (*Obs.* xvii. 13), *NOODT* (*ad leg. Ag.*, c. 10), and others suppose that this text and *l. 15, s. 1, infra*, are in contradiction to *l. 51, infra*. But *VORR* (*ad Pand.*, h. t. s. 9) maintains that here and in *l. 15, s. 1*, the jurists speak of a wound which, though it appears deadly, is yet not certain to cause death (*de vulnere certo certius mortifero adeoque certissimum mortis sequelam habituro*). And it must be granted that the language of the *l. 51, pr.* (*quorum ex vulnere certum esset aliquem vite excessurum*), when compared with *l. 15, s. 1* ("*Hæc ita tam varie*," etc.) gives some countenance to this view. *ECKHARDT, Herm. Jur.* i. 4, 161, maintains that the first assailant is liable only *de vulnerato*, and that no more is meant by the concluding words of *l. 51, pr.* The technical valuation under the Aquilian law would prevent the application in such a case as this of the principle of the Scotch law, that the second wrong-doer is liable only for the amount of damage "specifically" caused by his act. *BELL's Com.* i. 461 (i. 160, *Shaw's ed.*), a principle which in one case (*M'Lean v. Grant* 1805, *BELL's Com.* l. c.) was carried to the length of maintaining that a man by committing one fault might wipe out the consequences of another. See *Davidson v. Mackenzie*, Dec. 20, 1856, 19 D., 226.

§ 5. Also, Proculus says that the action under the Aquilian law lies against one who has irritated a dog and made it bite a man, although he did not hold him. But Julianus asserts that he is liable only if he held the dog and made him bite any one; but that if he did not hold him there must be an action *in factum*.

§ 6. The action of the *lex Aquilia* is competent to the master or owner.

§ 7. If damage has been done wrongfully to a slave whom I am to redhibit to you (on the rescission of a contract of sale), Julianus says the Aquilian action is competent to me, and that I, when I shall redhibit, must pay over the damages recovered to you.*

§ 8. Also, if a slave be *bona fide* in the possession of any one, is the *actio legis Aquiliae* competent to the possessor? I rather think that an action *in factum* will lie.†

§ 9. Julianus says that one to whom clothes have been lent cannot, if they have been torn, sue under the Aquilian law, but that that action is competent at the instance of the owner.‡

§ 10. Julianus discusses the question whether he who has a liferent or a right of *usus* has the action of the Aquilian law; and I think it more correct that a *utilis actio* should be granted on this ground.§

XII. *Paulus, l. x. ad Sab.*—If the proprietor shall wound or kill his slave, in whom I have a right of usufruct, I have an action, after the likeness of the Aquilian, against him to the amount of my interest; so that even that part of the year is taken into account in the valuation in which my usufruct did not yet exist.||

XIII. *Ulpianus, l. xviii., ad Ed.*—A freeman has a *utilis actio* under the Aquilian law in his own name; for he has not the direct action, because no one can be regarded as the owner of his own limbs. But the owner has an action in the name of a runaway slave.¶

* See *l. 23, s. ult.; l. 24 D. de aed. ed.* (21, 1).

† See *l. 136, D. de R. J.* (50, 17); *l. 17 pr. h. t.*

‡ Because the borrower is not liable for injuries which he cannot prevent by any care or diligence, *l. 19, D. commod.* (13, 6). But if he has an interest, *e.g.*, if he could have prevented the damage, he will have an *utilis actio*, *l. 41, D. loc., cond.* (19, 2). Voet, *ad h. t.*, s. 10, adds that in modern law the borrower should have an action to the extent of his loss by having the period of his loan cut short. *L. 2 pr., D. si quadr. paup.* (9, 1) applies to the case in which a borrower himself incurs actual loss (eo quod tenetur).

§ *Utilis actio*.—As to the practical identity of *actiones in factum* and *utiles* in the time of the great jurists, and the disappearance of all difference except of name in the time of Justinian, see SAVIGNY, *System*, vol. v., p. 93, sqq. The Aquilian law was originally so limited in its terms that the use of these fictitious or equitable actions in order to supplement it became especially frequent in reference to it.

¶ A person holding by a subordinate title is entitled to recover to the extent of his interest. See *Waters v. Monarch Life Assurance Co.*, 25 L.J., Q.B. 102.

‡ In estimating the compensation under such an action, the expense of cure and the loss from being prevented from attending to business or labour would alone be taken into account; not the wounds themselves or personal deformity, "*quia liberum corpus nullam recipit estimationem*," *l. 7, D. his qui cfud.* (9, 3), l. 3; *D. si quadr. paup.* (9, 1). Compensation for the death of a relation and loss of maintenance was scarcely known to the Romans. See *l. 4, § 1, D. ad L. Corn de sic.* (48, 8), as given more fully in *Coll. Leg. Mos. et Rom.*, i. 1, 2; CUIJAC. *Obs.* xiv. 4; PURFENDORF *L. Nat. et Gent.*, iii. 1, 7, 8.

§ 1. Julianus writes that if a freeman is my slave in good faith, he is liable to an action under the Aquilian law at my instance.

§ 2. If the slave of an inheritance (not yet entered on) be killed, there is a question, who can sue the Aquilian action? for there is no owner of this slave. And Celsus says that the law intended the losses of the owner to be repaired; therefore, the inheritance shall be held as the owner. Wherefore, when the inheritance is entered on, the heir may sue.*

§ 3. If a slave bequeathed as a legacy be slain after the inheritance is entered on, Julianus says that the action of the Aquilian law is competent to the legatee, provided he has accepted the legacy after the death of the slave; but if he repudiates it, it follows that the right of action is in the heir.†

XIV. *Paulus, l. xxii, ad. Ed.*—But if the heir himself has killed him, it must be held that the action lies against him at the instance of the legatee.‡

XV. *Ulpianus, l. xviii, ad. Ed.*—Hence it follows, that if a slave bequeathed as a legacy, be killed before the inheritance is entered on, § the action on the Aquilian law remains with the heir, being acquired by the inheritance. But if he has been wounded before the inheritance is entered upon, the action remains indeed in the succession, but the heir is bound to cede it to the legatee.

§ 1. If a slave mortally wounded should afterwards perish in a shipwreck, or by the falling of a house, or by some other violence, sooner than he would otherwise have died, (it seems) that an action may be brought, not for killing but for wounding him. But if a manumitted slave, or one who has been sold, perishes by a wound, Julianus says that an action lies as for killing him. These cases are so differently decided, because it is indeed true that he was killed by you when you wounded him,|| which was only certain when he died; but in the former case, the fall of the house did not allow it to appear whether or not he was killed. But if you have appointed a slave, mortally wounded, to be free and your heir, and he has afterwards died, his heir¶ cannot sue on the *lex Aquilia*.

XVI. *Marcianus, l. iv, Regularum.*—Because the matter has come into a condition in which it cannot begin. (*Quia in eum casum res pervenit a quo incipere non potest*).**

* Cf. *infra*, l. 43.

† *Si modo*, etc. Because his recognition of the legacy operates backwards to the date of the *aditio hereditatis*, L. 44, § 1; l. 86, § 2, *D. de Legg. I.* (30 un.)—Cf. *infra* l. 15.

‡ Cf. l. 7, s. 4, *D. de dolo malo* (4, 3).

§ The specific corpus bequeathed being extinguished and the legacy having lapsed.

|| Cf. l. 11, s. 3; l. 51 *h. t.*

¶ Cf. l. 36, s. 1 *infra*.

** See l. 85, s. 1, *D. de R. J.* (50, 17); l. 3, s. 2, *de his quæ pro non scriptis* (34, 8), etc. *Pollock v. Paterson*, Dec. 10, 1811, F.O. This rule was not universally recognized; l. 98, *pr. D. de V.O.* (45, 1); and SAVIGNY (*System*, v. 552 sq., cf. ii. 70), thinks that the attempts which have been made to lay down rules and formulas for the numerous exceptions to it, have been unsuccessful.

XVII. *Ulpianus, l. xviii, ad Ed.*—If the owner kill his own slave, he will be liable to an action *in factum* at the instance of the *bonæ fidei possessor*, or of one who has received the thing as a pledge.

§ 1. If Stichus be bequeathed to two persons conjointly, one of whom repudiates, and the slave is killed, I think that the co-legatee alone can sue on the Aquilian law, because the right of property accresces to him *retro*.

XVIII. *Paulus, l. x., ad Sab.*—But if one who has taken a slave in pledge kills or wounds him, he may be sued by the Aquilian action and the *actio pigneratitia*; but the plaintiff shall be bound to be content with the one or the other.*

XIX. *Ulpianus, l. xviii, ad Ed.*—If any one kill a slave who is common property, Celsus says that he is liable by the Aquilian law. It is the same if he wounds such a slave.

XX. *Idem, l. xlii, ad Sab.*—At least for the proportion in which the plaintiff is proprietor.

XXI. *Idem, l. xviii, ad Ed.*—The law says, "the greatest value which the thing has possessed within a year." Which clause appoints the valuation of the damage that has been done.

§ 1. The year is computed backward from the time when any one is killed. But if he has been mortally wounded, and dies after a long interval, then we reckon the year from the time he was wounded, according to Julianus, though Celsus asserts the contrary.†

§ 2. But whether do we estimate the value of the body alone of that which is killed, or the loss which we incur by its being killed? (*quanti interfuit nostra, non esse occisum*). And the law is that the amount of our interest is estimated.‡

XXII. *Paulus, l. xxii, ad Ed.*—Accordingly, if you have killed a slave whom I promised to deliver under a penalty, my whole interest (*utilitas*) is considered in the action.

* This passage of Paulus contemplates the more usual case in which the remedy of the Aquilian action is precisely equivalent to that afforded by the action on the contract. But sometimes the peculiar valuation provided in the *lex Aquilia* would give the plaintiff something over and above the present value of the slave, which alone could be recovered by the latter action. Then the rule of l. 41, § 1, *D. de O. et A.* (44. 7) comes into operation: "Si ex eodem facto dux competent actiones, postea iudicis potius partes esse, ut quo plus sit in reliqua actione id actor ferat;" and the owner would be entitled to bring the Aquilian action for the difference, between the amount he had recovered by the action on the contract and the highest value of the slave within a year, or within thirty days. *L. 34, § 2, in f., D. de O. et A.* (44. 7); l. 7., § 1, *D. com.* (12. 6); l. 2, § 3, *de priv. delict* (47. 1), etc. Cf. SAVIGNY, *System*, v. 226–231, who cites, on p. 227, a number of passages which, looking only to the ordinary case, appear like this to deny the right of suing for the surplus recoverable by the Aquilian action, and thus to make the concurrence (*concursum*) total instead of partial. See numerous examples of this rule in the decisions of American Courts.—SENGWICK on Damages, p. 429.

† In other actions the *litis contestation* fixed the time at which the matter in dispute was valued; but in obligations arising from delicts, the time of the delict, as a general rule.

‡ The meaning of the phrases *quanti res est, quanti fuit*, etc., is fully discussed by SAVIGNY, *System*, vol. v., Beyl. XII. It may differ, as the word *res* is referred to the *corpus* or material object, or to the interest of the party in it (*quod interest, or utilitas*). The former and more literal meaning would be that of the older laws, developing into the latter with the progress of society; s. 10, *Inst. de L. Ag.* (4. 3).

§ 1. Also profits attaching to the thing (*causæ corpori cohærentes*) are estimated; for example, if any one has killed one of a company of comedians, or a band of musicians, or of twins, or of a set of four horses, or of a pair of mules. For account is to be taken not only of the thing perishing, but also of the diminished value of what remains.*

XXIII. *Ulpianus, l. xviii., ad Ed.*—Accordingly, Neratius writes, that if a slave who has been instituted heir should be killed, the value of the inheritance comes within the action.

§ 1. Julianus says, that if a slave appointed to be free and heir, should be killed,† neither the substitute nor the heir at law shall obtain, under the action of the Aquilian law, the value of the inheritance, which could not belong to the slave. Which opinion is correct. He says, that therefore the real value of the slave alone is to be estimated, because this alone seems to be the interest of the substitute. But I think that not even this should be estimated, because, if he were heir, he would also be free.

§ 2. Julianus also says that if I be instituted upon condition that I shall manumit Stichus, and if Stichus be killed after the death of the testator, I shall obtain as damages the value of the inheritance; for the condition failed in consequence of his being killed. But if he is killed in the lifetime of the testator, no account taken is of the inheritance, because the inquiry as to his value is carried backwards.

§ 3. Julianus also says, that the value of a slave killed is taken at the time when it was greatest within that year; and therefore, if the thumb of a valuable painter be cut off, and he be killed within a year, the Aquilian action lies, and the slave is estimated at the value he possessed before he had lost his art with his thumb.

§ 4. But if a slave be killed who had been guilty of great frauds in my accounts, and whom I had intended to put to torture that the accomplices of his fraud might be discovered, Labeo correctly writes that he must be estimated at the amount of my interest in the detection of the frauds committed by him, not at the value that would be put on that slave in a noxal action.

§ 5. If a slave of good morals be killed within a year after he has fallen into bad courses, he will be taken at the value which he possessed before he changed his habits.

§ 6. In fine, everything which, within a year of the time when he was killed, made a slave more valuable, must be added to the damages.

§ 7. If an infant less than a year old be killed, it will be enough to refer the estimate to the period during which it lived.

* It is settled law that where one of a set is destroyed in the case of articles of taste, the owner is entitled to the value of the whole set. The point was settled in the case of Lord Salisbury, where two of a set of vases of Sevres china were destroyed, and he got £4000, the value of the whole set. See per Hope, J. C., in *Cleghorn v. Taylor*, Feb. 27, 1856, 18 D. 664.

† *Should be killed, i.e., during the life of the testator.* The person who took an inheritance from which he would have been excluded if the slave had survived the *dominus*, had evidently sustained no damage by his death; but, on the contrary, had gained. *Cujacius, Obs., xxvii. 12.*

§ 8. It is certain that this action is competent to an heir and other successors. But it will not lie against an heir or other successors, because it is a penal action, unless the heir happen to be made richer by the damage.*

§ 9. If a slave be killed maliciously, it is clear that the owner can sue under the *lex Cornelia* also, and if he sue under the *lex Aquilia*, it should not be made a *præjudicium* (precedent) in the Cornelian action.†

10. This action is competent for the simple value against one who confesses, for the double against one who denies.

§ 11. If any one should erroneously confess to having killed a man who is alive, and afterwards be prepared to show that he is living, Julianus says that the Aquilian action will not lie, although he has confessed; because the judicial confession only relieves the plaintiff from the necessity of proving that *the defender* killed the man; but it is necessary that a man should have been actually killed by some one. ‡

XXIV. *Paulus, l. xxii., ad Ed.*—This is still more evident in the case of a wounded slave. For, if one confess to having wounded him, and he be not hurt, for what wound shall we award damages? or to what time shall we refer?

XXV. *Ulpianus, l. xviii., ad Ed.*—Further, if he be not killed, and yet has died, one is not liable for the dead slave, although he may have confessed.

* The deviation from equitable principles which made actions for reparation not transmissible against the heir of the wrong-doer, is explained by the fact that the Romans did not sufficiently distinguish between reparation and penalty. SAVIGNY, *System*, v. 50. The Canon law made such actions competent against the heir to the amount of the estate inherited from the delinquent. *Id.*; BÖHMER *J. E. P.* v. 17, 132-137. In the law of Scotland, while proper penal actions follow the rule here laid down, claims for reparation are transmitted against the representatives of the wrong-doer. Bell's *Pr.* 546; Ersk. *Inst.* iii. 1, 15; *Morrison v. Cameron*, 25 May, 1809, F.C.

† Cf. l. 7, s. 1, *de injur* (47, 10)—where the distinction of actions in which “*de damno principaliter agitur*,” and those in which “*de ea re agitur quæ habet publicam executionem*,” is illustrated. So careful were the Romans that the judge should form an independent judgment in the latter class of actions, that it was not only required that no private action arising from the same fact, should be used as a precedent, but it was the general rule that no such precedent should be allowed to exist. Wherever, therefore, a private action might thus be a *præjudicium* to a public action, it was either incompetent, or guarded by an exception limiting its conclusions so as not to trench upon the subject matter of the public action. The action of the *lex Cornelia* applied to crimes involving *dolus*, the Aquilian action might refer to an act involving only *culpa* or negligence; and hence the latter might be allowed to proceed on the understanding that no judgment should be pronounced finding the defendant guilty of more than *culpa*, at least until the sentence in the public action had been given. See SAVIGNY, *de Concursu delict. form.*, *Verm. Schrift.* iv. 129, sqq.

‡ In actions in which “*lis inficiendo crescit in duplum*” confession of liability is *simpliciter* saved from payment of double the value, so that it became a sort of transaction (*transactio*), and could not be retracted even on the ground of error. But here the confession related only to the personal act of the defender, and it was competent for him to contradict his admission, or rather to avoid its consequences, by showing that the damage, which was the ground of action, did not exist.—(See next law.) The transaction involved in the confession relates only to the subjective delinquency of the defender, not to the *corpus delicti* itself. See SAVIGNY, *System*, vol. vii., p. 17, 18, 35-37.

§ 1. If a procurator, a tutor, or a curator, or any other, confess that an absent person wounded a slave, a *utilis actio* lies on his confession.

§ 2. It must be observed that in this action, which lies against one who confesses, the *Judex* is appointed, not to ascertain the fact, but to assess the damage; for the office of judge against parties confessing is null.*

XXVI. *Paulus, l. xxii., ad Ed.*—For example, if he who is sued confesses that he killed the slave, and is prepared to pay the damages, and his adversary estimates them very high.

Review.

On the Act Regulating the Limitation of Civil Suits in British India. By NINIAN HILL THOMSON, Esq., Advocate. Second Edition. Calcutta, Bombay, and London.

WE have received a copy of a new edition of a work on "The Limitation of Suits" in the Indian Courts. It is published in Calcutta and London, and seems to be a most careful and accurate treatise on the subject, containing all the decisions of the High [*i.e.*, Supreme] Courts on the various questions which have arisen. These decisions are quite multitudinous; and in them every possible variety of opinion and construction has evidently, at one time or other, been adopted by one or other of the Courts. Where there are so many decided cases to refer to, it must be a great boon to the Courts, and to those who have to practise in them, to have such a book as this to guide them. The author is Mr Ninian Hill Thomson, a member of our bar, who has been some ten years in India. During the greater part of that time he has filled important judicial appointments in and near Calcutta, and has therefore had great experience of the questions with which he deals.

The law as to the Limitation of Suits is laid down in an Act (xiv. of 1859) of the Governor-General of India in Council, which goes into many details, allotting various periods of limitation for different causes of action. The Act is silent as to the acquiring of title by prescription. This rather surprises us, as it seems to us that both branches of the subject might very advantageously have been embraced in one Act, when legislation was being had recourse to. The object of the

* *Nam nulla partem iudicantis in confitentis.* This relates to the rule *confessus pro iudicato habetur*. In Roman law, a confession was a surrogate of a judgment, and when the action was for a certain sum of money, which the debtor admitted to be due, execution followed without any formal decree, l. 9, 6, *de Execut.* (7, 58). But in this and similar cases, the confession applied only to a particular fact as to which the judicial function ceased, while a further action (*confessoria*) was necessary to fix the amount of damages by a judgment. SAVIGNY, *System*, vol. vii. 8, etc.

Act is the same as our Act establishing the triennial prescription, and the clauses so common in recent legislation, limiting the time for bringing actions against public officials; but its framers had this great advantage—that they had the whole subject before them at once, and were not dealing with each matter by itself. They limit to one year suits for recovery of pecuniary penalties; actions of damages for injury to person, property, or reputation; servants' wages, tavern bills, bills for board and lodging, etc. The limit is three years for claiming hire of vehicles, shop debts, rents, etc., or contesting the justness of awards, under certain Indian regulations, and orders regarding the possession of property under certain Indian Acts, and in some other cases. The period rises to twelve years for recovery of immoveable property, shares of joint family properties, etc.; and as high as thirty or sixty years in suits against a depositary or mortgagee of moveable or immoveable property. There seems to be no limit to suits against trustees during their lives, or against their representatives, for the purpose of following in their hands specific trust property.

Such, in a general way, seems to be the scope of the Act, which seems certainly ill-drawn and ill-expressed—a fact to which Mr Thomson does not fail to draw attention. Mr Thomson's book is full of interest to the general student of Indian law; and must, we should think, be invaluable to the Indian practitioner.

Indian legal affairs do not attract much attention among the professions here, inasmuch as none of the litigations arising in India ever come to be dealt with in Scotland. In England, however, we believe there is a growing interest taken in Indian legal subjects. This is due partly to the great increase in the number of Indian Appeals to the Privy Council, and partly, no doubt, to the very large number of English barristers who now practise in the Courts in India. In that country there has long been found a most useful and profitable outlet for active and energetic members of the professions who have not seen their way to early success at home. Of late years the number of those practising there has doubled or tripled, in comparison with the number to be found in India twenty years ago. Yet we have good reason to believe that the field is still a good one for competent men; and by all accounts there is plenty of work to be done by lawyers, who are alike willing and able to work. The Indian Bar is open to Scotch advocates as well as to English barristers. But it is remarkable how very few of the former have ever thought it worth their while to turn their attention to it. So long as the practice of Westminster Hall and Lincoln's Inn was rigidly followed in the Indian Supreme Courts, a Scotch lawyer would doubtless have been at first rather at a disadvantage. He would have much to unlearn, as well as much to learn. But no such difficulty exists now. For the last eight or ten years, the practice of the High Courts, as indeed of all the Courts throughout the country, has been regulated by a Civil Procedure Code, which differs as widely from the procedure of the Courts in England, as from that of our Courts here,—while the criminal law is contained

in a penal Code of great merit and simplicity. Under the Code of Civil Procedure, the Supreme Courts, which had formerly administered English law, with all its complicated and expensive distinctions between "law" and "equity," have solved the problems as to the fusion of law and equity, which is at this moment so sorely perplexing and puzzling the Lord Chief Justice of England and his learned brethren at Westminster Hall. For the same Judges [all of them English barristers] who formerly could deal with cases only either on the "Common Law Side," or on the "Equity Side," of the Court, found that under the new Code there was no manner of difficulty in raising all the issues between the parties,—whether of a strictly "legal" or of an "equitable" nature,—and disposing of them in one and the same suit at one and the same hearing. This has been clearly shown to be the case, by the evidence taken before the Scotch Law Courts Commission (see Evidence in Appendix to 2d Report, pp. 505, *et seq.*),—and we know from other sources that that evidence is sound. It would be well if this fact were borne in mind next year, if the impossibility or difficulty of effecting a "fusion of Law and "Equity," is again dwelt upon by the Common Law Judges of England, as forcibly, and, we may almost say, absurdly, as they were a few months ago.

The Month.

The Dignity of the Bar.—In turning over a file of the *Law Times* for the current year, we came upon a short article commenting on the fallen condition of the English Bar, as illustrated by the following description of a scene at quarter sessions. As "hugging" and "sucking up" are vices entirely unknown in Scotland, and no man ever attained practice or preferment in the Parliament House by any means except the honest and unaided exercise of his natural talents, we need hardly say that we quote the passage with no personal or local application, but merely for the purpose of giving our Scotch readers the satisfaction of thanking God that they are not as some other men are. At the same time, we have no objection to confess that we concur, subject to some reservation, in the conclusion which is expressed in the last sentence of the extract. The quotation is from a local and non-legal periodical of the English city where the quarter sessions in question are held:—

"At the quarter sessions, which are held immediately after those of the city, the briefs are at the disposal of the attorneys who act as clerks to the magistrates. They often leave them to their clerks, to give them as they choose. It is easy to imagine the longing looks, some bold, others more coy and concealed, but all displaying anxiety, which are, on such occasions, cast by the eyes of an over-crowded Bar upon these men upon whom the fate of each depends. To outsiders it seems difficult to understand how a set of men of the class to whom barristers mostly belong, can endure being placed in a position of dependence

upon solicitors and their clerks. The plan may rest on some supposed idea of honour and dignity, but certainly we were led to infer that the results were conducive neither to honour nor dignity; and we fear that those barristers who act most in accordance with the supposed honour of the profession are not those who, in —, get on best, at all events, at the sessions. We were initiated into the seats behind the scenes, and were instructed in some of the workings of the system. There appeared to be anxious inquiries into the health, and into the statistics of legal families, quite unusual under ordinary circumstances. This was chiefly in the barristers' corridor, before the Court opened, and when those barristers who are not given to these things were in the library allotted to them. Afterwards, in Court, we were struck with the amount of sweet and smiling notice bestowed by some upon the brief givers. It was somewhat like the cooing flirtations of a ball-room. The barrister, who is a gentleman in reality, as well as in name, would probably prefer remaining briefless to the end of the chapter, rather than obtain practice by what schoolboys call "sucking up" to attorneys. When we looked at the immense Bar which filled the front benches of the Court at the opening of the — sessions, we seemed able to distinguish, by their very appearance (and certainly by their manner), the men who are of this stamp. Report does not give them any great preponderance in the local Bar of —; but we think it is a misfortune for those people of our city who have the ill-luck to get in the meshes of the law, civil or criminal, if these gentlemen are left in the shade by the solicitors, in comparison with those who bestow on them the doubtful honour of courting them and their clerks for the sake of the briefs at their disposal. We hear of many projected reforms in the law. We are inclined to hope that one actual reform, not of law, but of custom, or etiquette, as it is called, will be to allow the public, when they choose, to go straight to a barrister about any case, without the intervention of a solicitor being forced upon them."

The Lord Justice Clerk's Address to the Juridical Society.—The Juridical Society was fortunate in obtaining the aid of the Lord Justice Clerk in the commencement of their course of lectures, and his lordship was happy (as he never fails to be) in the thoughts and arguments with which he encouraged the Society in their effort to widen and enrich the education of the coming generation of lawyers. Some passages from his eloquent address we cannot refrain from citing. In one passage he inculcates the necessity of studying the law of nature and nations as leading to a deeper knowledge of principles than can be obtained by merely registering precedents in the desultory pages of a barren and uncultivated memory; and he draws a lively contrast between the classical and the present iron age of Scottish jurisprudence, between the age of Craig and that of Shaw's Digest and Macpherson's Reports:—

"It may not be uninteresting to compare the gradual alteration—the transition from the purely classical age down to the present somewhat utilitarian age of Scottish law. Craig's work, 'De Feudis,' for instance, reads—in many parts of it—like a classical romance. He hardly ever quotes a case. There was no digest in his days, I suppose, and no current reports. He puts some cases in which he himself was engaged, and when he puts them, he tells the story with all the enthusiasm of a writer of a novel, and draws his illustrations from ancient and modern lore. He draws them from the laws of Europe at his time; and from the great jurists on the Continent who had gone before him. When Stair wrote, which was very considerably later, the precedents were beginning to come into play; but that great and wonderful work of his—for it is one of the greatest treatises that ever was written—has most extraordinary harmony and symmetry. He begins by laying his foundations deep in the soil of ancient law; and he

raises his structure storey by storey, strengthening it as he goes by the citation of juridical authority, and then showing how the decisions of the Scottish Courts squared with the principles he had learned in the school of European jurisprudence. What I am saying may be very well illustrated by comparing Stair's work with another very great and lawyer-like work—a work worthy to be put alongside with the great writer of 'the Institutes'—I mean Mr Bell's 'Commentaries.' The contrast is immense. Mr Bell is hard, strong, satisfactory, and clear; but, with him, Themis does not appear in her holiday garb, but in her ordinary working dress. There is not a shred or rag of ornament to commend her to any but a purely legal writer. I do not say that that is a matter to be regretted. It is the necessary consequence of large and multiplied transactions, of increased population, of larger communities, and, of course, a far greater number of legal precedents. In addition to that, it is perfectly true that, writing from mere authority, writing from general principle, endeavouring to maintain a proposition in law, simply on the ground that other great legal thinkers had thought so and said so before, is in one sense inferior to the reference to authority and precedent, for, if you can quote authority and precedent for that which you wish to solve, the thing is solved already—namely, by the promulgation of the precedent, which is law—and solved more satisfactorily and more completely if you can find the precedent than by the citation simply of the opinion. But I need not say that, although that is perfectly true, there is something fallacious in the reply that I have thus suggested. If you can find authority and precedent that exactly square with the case you have in hand, well and good; but the thing happens in nine cases out of ten that the precedent does not entirely meet the circumstances which you wish to solve; and then you are thrown back upon your legal principle. But if, in the meantime, the legal principle has vanished—if the ancient learning has gone, if by trusting to our systems at hand, we have neglected the old fountain—then of course our jurisprudence will degenerate and decay. The termination of the classical school of Scottish jurisprudence, I think, has been witnessed in our own day; and it was terminated by a very simple alteration in our forms—a very necessary and useful alteration—but it carried with it some drawbacks—I mean the abolition of written pleadings in the Court. There is no doubt it was absolutely essential, for time was too short for these written pleadings in the rapid movement of society in the present day. Transactions go on so much faster than they did; things are carried out so much more quickly; communication between one part of the country and another is so much more constant, that we could not afford to wait for the lengthened pleadings which our forefathers had. But I fear we have lost a great deal; and, in order to make up for that loss, I am anxious to impress upon the Juridical Society the importance of going to the active work of the law well prepared and well furnished with all those ancient stores of which our forefathers availed themselves so much, although, in the present mode of practice, there is not so much opportunity for their display. But any one who looks at the written papers of the last generation of great lawyers—of Thomson, of Cranston, of Clerk, of Moncreiff—will find in them an amount of research and an amount of solid learning which, I am afraid, would put many of us to shame, and which, I suspect, it would be very difficult indeed to parallel in our modern times. At all events, there was at one time the means and opportunity of study of that kind which our present forms and system hardly admit of."

There is, we fear, too much truth in the complaints so often heard of the decay of learning in our time, and the abolition of written pleadings has probably something to do with the change for the worse; but we are always tempted to think that the *laudatores temporis acti* exaggerate the learning of their predecessors, forgetting that a few quotations from Cujas, or even from Bartolus, may be hunted up even now by one who knows his tools with almost as great ease

as references to Shaw and Dunlop. It cannot be said of the Lord Justice Clerk, but of many grumblers it may be suggested that their admiration for the learned lawyers of last generation is accounted for on the principle "*omne ignotum pro magnifico*."

Two interesting facts within the personal knowledge of the Lord Justice Clerk are divulged in this address, the one that the late Lord Moncreiff—one of the greatest men in the history of our jurisprudence, and as to whom, unfortunately, too little is now known—

"Once projected a great work, which never went farther than a mere outline. It never went beyond a mere table of contents. I greatly regret that it did not, for it seemed to me to be conceived in so large a spirit, and to embrace so wide a scope, that it probably would have been, if it ever had been executed, a valuable contribution to our legal works. The order in which that work was to have been executed was the following:—The law of nature and nations; from that descending to European municipal law, ancient and modern, comprehending first the civil law; second, the common law; and third the general principles of the jurisprudence of modern Europe; then constitutional law, embracing the constitutional law of Great Britain, and also embracing the constitutional law of Scotland; while the next division was the Scottish municipal law, including real property, mercantile law, law obligations, personal obligations, and criminal law."

Again, speaking of Viscount Stair, who alone of our writers treats of the law of nations, the Lord Justice Clerk says:—

"Lord Stair was a very considerable international lawyer, and his chapter on 'Reprisals' contains the germ of the solution of many of the problems that have occurred in modern times. It is interesting and suggestive that in the debate upon the rupture between our Government and the Brazils, six or seven years ago, the Crown lawyers could find no authority on the subject. It was a question about the obligation of a foreign State to look after and secure vessels belonging to a friendly foreign State wrecked upon its coast; and I pointed out to the Attorney-General, Sir Roundell Palmer, a passage in Lord Stair which exactly, and with the most precise and clear words, solved the very question which we were anxious to have settled. And the reason of it is plain enough. Lord Stair not only wrote at a time when there was war between Holland and this country—two great maritime Powers—but he wrote in Holland, where he had the opportunity of seeing the other side of the question, and where this matter was at that time very greatly agitated."

But beyond comparison, the most graceful and touching part of a discourse where all was graceful and elegant, is that in which, after enlarging on all the elements of a sound legal education, the orator pointed to one who was but lately his colleague, as the exemplar of all the virtues that ought to adorn the profession of the law. Beside the eloquent and cordial memorial of Lord Barcable from the pen of another distinguished lawyer which appeared in our own pages, we desire to place the following tribute from another admirer not less able to appreciate and record the great qualities too soon lost to his country:—

"I am speaking to many who are but entering on a course of life which takes me back six-and-thirty years—at a time when Jeffrey had but just exchanged his critical and forensic laurels for a not less brilliant judicial career; and when the great, masculine, and powerful intellects of that great circle of Scottish lawyers were the delight and astonishment of the juniors of the bar. Well

might we admire them, for certainly never was the profession more elevated or illustrious than in their hands. That they were great lawyers was not the greatest of their merits, for in all the acquirements which adorn the intellect or enlarge the heart, they were the centre and attraction of the country they adorned. In these recent decorations—the new memorial windows in the Parliament House—the work mainly of the energetic treasurer of the Faculty, we may read the memorial of the past as it was when I first entered the profession. How many changes have passed in review since then? how many come and gone? how many lights extinguished, and brilliant prospects quenched? One, all too recent, in this discourse, I cannot refrain from recalling—one who fell in the heat of the battle, with his harness on his back, with all his intellectual armour at its brightest, overpowered by an impossible task. Had Edward Maitland lived, I might have pointed to him as combining in a rare degree the graces and accomplishments which have been my theme to-night. Enthusiastic, yet judicious; learned, without a tinge of pedantry; not less severe in logic than fertile in resource; armed at all points—for all service—filled with admiration for the noble, and with scorn of the base—he presented as faithful a reflex of the dignity and honour of our craft as the bar of any country ever furnished. Long will his memory be cherished, and long shall we mourn his irreparable loss."

The Juridical Society and Edinburgh Lawyers.—We gladly insert the following letter, both for the sake of the writer and because we regret to have wounded the susceptibilities of a really useful and respectable society. We do not think that our readers will have any difficulty in discovering the meaning of the word "priggishness" when predicated of the thorough-bred Edinburgh lawyer, or in determining whether the attribute really belongs to that sublime being. It is only proper to observe that some of Mr Mackay's observations are beside the mark, as it was not the *thorough-bred lawyer*, but a very different thing—the *thorough-bred Edinburgh lawyer*, who was spoken of. There are, we hope, many lawyers living in Edinburgh, and even born and bred there, who are not "thorough-bred Edinburgh lawyers;" and we think it is difficult, though scarcely impossible, for thorough-bred lawyers who have been, or are, or (like our correspondent) will shortly be, "in the front ranks of the profession," not to rise above the coxcombry, the intellectual puppyism, pretension, mannerism, airs, pedantry, starch, or whatever it may be that constitutes the essence of the exquisite self-complacency of the "thorough-bred *Edinburgh lawyer*."

(To the Editor of the Journal of Jurisprudence.)

SIR,—In the last number of your journal, the following sentences occur, on which I ask leave to offer some comments:—"The Juridical Society admits as members only Advocates and Writers to the Signet; only the *crème de la crème* of the legal profession can obtain access within its sacred precincts, and every one who aspires to be only a S.S.C., or County Procurator, is rigorously excluded from its privileges. It must be acknowledged that, among the numerous benefits it confers on the studious youth, it aids in forcing into early and rank luxuriance that priggishness which is the most conspicuous characteristic of the thorough-bred Edinburgh lawyer."

The writer then conjectures, and conjectures rightly, from the fact that a fee is charged, that the lectures of the Juridical Society are not intended to be confined to any particular branches of the law; or, I may add, to lawyers only, if there be, as in a country where most men are politicians it

is reasonable to expect there are, persons who desire to know what the laws are before talking about them, or reforming them. The rule of the society as to its membership animadverted upon, was probably reasonable last century when the society was formed; but whether it ought to be maintained, now that the education of the other legal bodies has made so great an advance, deserves, and I daresay will, before long, receive the consideration of the members. It is the censure passed upon Edinburgh lawyers, however, against which I desire to protest. If thorough-bred lawyers be as this writer describes, then what must be the half-bred; or, if there be any, the ill-bred? What an opinion would any person ignorant of the facts, who accepts this view as true, form of the legal profession in Scotland, if such be the character of those who are its natural leaders? Priggish is vulgar for conceited: if there be a shade of difference between the two sufficient to justify the use of the former word, it means perhaps a person conceited about personal appearance or dress; but I do not imagine this is the quality ascribed to the thorough-bred Edinburgh lawyer. What is meant, I suppose, is that conceit which consists in an undue sense of mental superiority. That the quality exists in Edinburgh, as well as elsewhere, amongst lawyers, as well as other classes of society, I see no reason to doubt, but it is absurd to say the Juridical Society has anything to do with its formation, or to describe it as the characteristic of the thorough-bred lawyer. That society, as the writer admits, has always been distinguished from similar societies in aiming at being more than a mere debating club. It commenced, I believe, in the meeting together of a number of young lawyers for the purpose of mutual explanation of the text of Erskine's Institutes, and although the element of debate has been more prominent in its recent history, it has never forgotten its early traditions. Its valuable law-library is one proof of this; the successive editions of its styles are another, and the lectures of this winter are an experiment in the same direction. All these are things which tend to that which is the most alien to conceit,—genuine study. To defend the Edinburgh lawyer from the imputation of conceit, it might be sufficient to appeal to the examples of those who have been recently, or are now, in the front rank of the profession; but I will venture a step further, and ask whether this failing is not almost an impossibility in the thorough-bred lawyer, who must be a man of sound judgment, able to estimate men and things at the proper value, and in their relative proportions. How can such a person, however great his knowledge of Scotch law or skill in pleading, when he reflects on the sciences of which he is wholly ignorant, or at best acquainted with a few of their popular results, entertain a very lofty opinion of his own attainments? Or if he confine his observations to that field which is his own, when he studies the wide and varied learning of Stair, or the cogent reasoning and strong sense of Erskine, must he not feel that, however high his attainments, there is a height beyond? Permit me, in conclusion, to express the conviction, that the interests both of jurisprudence and Scotch law require a careful abstinence from what is personal and petty. Scotch lawyers have very different work before them than that of picking holes in each other's coats. I am sensible I may have written in stronger language than the occasion requires, or I am entitled to use, but a young lawyer may be pardoned for being sensitive to any aspersion, however unjust, made on the character of his profession.—I am, your obedient servant,

Æ. J. G. MACKAY.

The Parliament House Book.—We received Mr Burness's valuable volume for 1870-71 too late for notice in our last number. Its merits are too well known to need eulogium; but it may be worth reminding our readers that it contains a complete table of the stamp duties leviable under the Act of last Session and previous statutes, as well as the revised table of fees introduced since last issue. These and other improvements which are constantly being introduced, make it useful to the profession in the country as well as in Edinburgh. Indeed, it is a significant sign of the times that the Parliament House Book and the Rolls of the Court of Session are now found on the tables of many "country agents;" and we hope we may soon be able to say that both of these useful publications are found in the hands of all.

The Chair of Commercial Law, etc.—We regret that an error occurred in our notice of this foundation in last number. It was said that Mr Leone Levi was not a lawyer. We understand that he is a Barrister of Lincoln's Inn; and his extensive works on Commercial Law may be referred to by those who wish to ascertain what are his qualifications for teaching that important subject.

The Sheriff-Substitutes' Claim for Promotion.—The thin end of the wedge has been inserted, and if it is only driven in with sufficient force we may hope, in a few years, to see that glorious American institution—a popularly elected judiciary—flourishing in our renovated and purified country. If we are fortunate enough to get rid of a bench appointed by the Crown or its satellites, it will be owing in no small degree to the boldness of the Society of Advocates of Aberdeen, who have rushed in where less courageous bodies would have feared to tread.

At a meeting on Nov. 12, 1870, it was unanimously resolved that "this society, having now had considerable experience of the very great judicial and administrative ability of Mr Sheriff Comrie Thomson, and of the admirable manner in which he has filled the office of Sheriff-Substitute, are of opinion that no appointment more satisfactory to the community and the profession could be made to the vacant sheriffdom of Aberdeen and Kincardine, than that of Mr Thomson." The society accordingly memorialised and sent copies of the minute of meeting to the Home-Secretary and Lord Advocate.

Election of Judges by the bar is the natural prelude to their election by the people. That, however, is too good a thing to hope for all at once. It must, we think—for we are moderate in our expectations—be preceded by the adoption by other legal bodies in Scotland and England, of the wise, well-considered, and dignified course of action which the Aberdeen advocates have so judiciously and so delicately introduced "for the first time in Scotland." Old-fashioned prejudices are not easily overcome; but as the provincial "bars" which have sprung into existence since 1853, now undeniably excel the bar of

Scotland in learning, and all the other attributes of the advocate, they must be allowed to set the fashion also in regard to the etiquette and the proprieties of professional conduct. The changes we have indicated seem, therefore, to be only a matter of time; and we sincerely hope that we may live to see the Faculty of Advocates meet in solemn conclave to advise the Government with regard to every appointment made to the Bench of the Supreme Court, and to see their recommendations obsequiously obeyed. How many intrigues would be obviated, how many jealousies prevented, if, when the next vacancy occurs in the Supreme Court, a resolution of the bar, superseding the Lord Advocate, were authoritatively to inform Mr Bruce whether Mr A. or Mr B. or Mr A. B. is the best furnished with judicial accomplishments!

But, laying jesting aside, we cannot help regretting, first, that so venerable and respected a body as the advocates of Aberdeen should have done a thing so odd and so ill calculated to effect its ostensible purpose; and, in the second place, that an experiment so unhappily conceived should have been made not *in corpore vili*, but upon so able and estimable a judge as Mr Comrie Thomson. There is no one less likely to be guilty of a breach of decorum in his own conduct, and we can well imagine how aggravating to his feelings this *gaucherie* of his admiring friends must have been. In another point of view it is much to be regretted. We have always favoured the claims of local Judges to be promoted to the office of principal Sheriff, so long as that superfluous office is retained. But premature and ill-judged efforts to effect such promotions can only discredit claims which at the proper time and in the proper person will not fail to be recognised. At present some very able and efficient men hold the office of Sheriff-Substitute, but (except in the case of the senior Sheriff-Substitute of Midlothian, who would probably refuse to exchange his present office for any ordinary Sheriffship) it cannot be said that length of service has given any one of them a right to promotion. The question raised by some recent suggestions is not whether Sheriff-Substitutes should be promoted when they have earned promotion by long and good service, but rather, whether a few years' tenure of the office is to be a regular avenue to higher office, and eventually to the Supreme Court Bench. This is too large a question to be fully considered here. It deeply affects the efficiency and welfare of the bar, and even suggests whether the French distinction between the judicial and forensic career ought to be introduced.

But two remarks are very obvious; and we make them here with no desire to prejudice the chances of any Sheriff-Substitute who thinks himself ripe for translation to the higher office. On the contrary, there are at least three resident Sheriffs whom we should regard as great acquisitions to the Parliament House. It is, however, necessary to keep in view the general considerations raised by recent claims of this kind. First, if every Sheriff-Substitute is to be considered "on the ladder," some notice of the change ought to be given,

in fairness to those who have toiled on in the Parliament House for no present reward, but working and waiting there for future promotion, and using the means to obtain it which are sanctioned by old use and wont. In the second place, if this view of the office of local Judge is to prevail, the power of appointment must immediately be transferred from the Sheriff to the Lord Advocate. Sheriffs generally bestow their patronage with a very praiseworthy disregard of personal friendship, and under a certain feeling of responsibility. But it is one thing to appoint a man to be local Judge for a district who is content to remain there for the rest of his natural life, or until, by unusual merit, he has earned a claim to rise; and it is quite another thing to appoint one who, if he does his duty decently well for three or four years, asserts his right to the next Sheriffship or it may be to the rank of Solicitor-General. If the rights and pretensions of Sheriff-Substitutes are to be so entirely changed, it is quite plain that their appointment should rest with the Minister who is responsible for the proper working of the whole judicial system, and that it ought not to be in the power of any Sheriff to give any young man whose abilities he has had private opportunities of becoming acquainted with, at prayer meetings or otherwise, an enormous advantage over all his compeers.

Andrew Jameson, Esq., Advocate (1835), Sheriff of Aberdeen and Kincardine, died at Edinburgh, after a few days' illness, on 30th October, aged 59. The following summary of his life, and estimate of his character, is taken from the observations made by Sheriff Comrie Thomson, to the practitioners in the Aberdeen Sheriff Court, on the first meeting of the Court after Sheriff Jameson's death:—

"I am sure that you will agree with me in thinking it only fit and proper that we should not proceed to the business of the Court this morning without referring, though it be only in a few brief and imperfect sentences, to the great loss that we have all sustained in the lamented death of the Sheriff of this Sheriffdom. It is with no surprise that I find that that event has cast a gloom over the whole community, not only in this city and district, but also in Edinburgh and throughout Scotland. But in some respects it is remarkable that one whose life was free from ostentation or parade, and unmarked by any startling incident, should close his career not only amid the regrets of private friends and professional brethren, but that his death should have awakened a grief so widespread and so deep. By his removal the public has lost one of its ablest, most experienced, and most devoted servants; society has been deprived of an honest, lovable, and accomplished man; while the Church has to mourn for an intelligent, active, and yet most humble Christian. Sheriff Jameson's professional life may be summed up in a very few words. The son of a local Sheriff whose memory is still warmly cherished in Fife, he was called to the bar in 1835. He had considerable practice; but delicate health soon forced him to seek warmer skies than ours. On the Continent he was not idle, but diligently made himself acquainted with the languages, laws, and usages of the countries he visited. He was employed to report upon the laws of Malta, and subsequently framed a code both of criminal and of civil law for that island. For this service he received the thanks of the Home Government. On his return to Scotland, uncertain health induced him to accept the office of Sheriff-Substitute at Ayr, which he held till 1845. In that year he became Sheriff-Substitute at Edinburgh, and

filled that appointment for twenty years. He was then promoted to the office of Sheriff of this county, which he has held for the last five years. I need scarcely say how great and how universal has been the honour in which he has been held both in Edinburgh and in Aberdeen. Gentlemen, I have had the privilege of being on terms of the greatest intimacy with Sheriff Jameson for ten years past. The leading intellectual characteristic which seemed to me to distinguish him was shrewdness; the prominent moral feature was honesty. He was not brilliant, but he had a wonderful amount of common sense. He was careful to collect the opinions of others. He weighed them humbly and faithfully, but no man was more independent and regardless of what was merely popular in forming his own judgments. In everything he was free from narrowness. Nowhere was this more conspicuous than in the views he entertained on religious and ecclesiastical subjects. His own opinions were most definite, and were held with unhesitating tenacity. But I have often heard him speak of the opinions of others, which did not run precisely in the same grooves as his own, with singular deference and charity. Nothing was more remarkable to those who were associated with him professionally than the intense conscientiousness with which he discharged his public duty. His natural ability and large experience might have been supposed to enable him to go through his work rapidly. And in a certain sense that was true, as you know, who have had occasion to notice the despatch with which the appeal business of this Court had been conducted. But when a case afforded room for considerable doubt, however trifling the amount at stake, you would scarcely believe how unsparing he was of reflection, of research, and of laborious reading, before he finally disposed of it. I need not do more than recall to you how considerate he was of the convenience and comfort of the practitioners at this bar; how affable, and yet how dignified, his manner. I can scarcely trust myself to speak of his unvarying, almost paternal, kindness to myself. I am thankful to-day to be able to say that, during the whole time that we have been associated here, there never has been even a cold look between us, and that we never ceased to work in perfect harmony and mutual confidence. Let not the good that he has done be 'interred with his bones.' He has left to all of us a precious legacy—the example of a good life. A man of the world, he was not worldly; with decided and boldly proclaimed religious beliefs, he was not intolerant; a hard worker in our common profession, he was full of kindly sympathies; a frugal man, he was ever generous. I am sure you sympathise with his bereaved family, and that in this place, the scene of his last labours, his memory will not soon be permitted to fade."

Sheriff Jameson's unobtrusive manner, and the comparatively limited sphere of his work, prevented many from knowing how important were his labours in connection with the Maltese codes referred to above, and how highly they were appreciated by those best capable of judging. Those most intimately acquainted with the history and condition of Malta, its curious mixture of civil, ecclesiastical, and military usages, and the various nationalities from whom its population is drawn, can best appreciate the difficulty of framing a code of laws which should be at once effective for the purposes of government, and tolerable by the inhabitants. No one was fit to do it who had not attained what Lord Bacon calls the "vantage-ground" of the science of his profession. But ample testimony has been borne, from various quarters, to the admirable manner in which Mr Jameson discharged his task. In a despatch to Mr Gladstone, (then Under-Secretary for the Colonies,) Sir P. Stuart, the Governor of Malta, speaks of the Report on the Code as exhibiting a "most extensive knowledge of

the provisions of the Continental Codes, as well as an intimate acquaintance with the general principles of criminal legislation." The late Lord Derby wrote to Mr Jameson, with reference to the same matter, in 1843, that he "is impressed with a deep sense of the ability and learning which you have brought to bear on the subject, and would convey to you his grateful acknowledgments of the diligence with which this important task has been carried to its close." Not less gratifying was the testimony borne by the great jurist, Mittermayer of Hiedelberg, who, writing to one who is fitly described as "un savant qui a consacré sa vie entière à l'étude de la théorie et de la pratique des lois pénales de tous les pays civilisés," says:—"le meilleur code de la procédure criminelle est celui de Malte, car il a été rédigé en commun par des jurisconsultes anglais et italiens et puis corrigé et refait d'après les indications des praticiens les plus éminents de l'Ecosse."

Scotch lawyers have not done much of late years to keep up their old reputation in Europe, and few were aware that the quiet Sheriff, whose connection with the Continent seemed to be confined almost exclusively to ecclesiastical and evangelising movements, had so directly influenced the legislation of an important community. Mr Jameson was offered the post of Chief-Secretary to the Government of Malta, which, however, he declined, and in 1850 he was employed by Earl Grey to revise the civil code of the island, a task which he also brought to a successful conclusion.

No notice of Sheriff Jameson would be complete which did not refer to his efforts for the improvement of the Sheriff Courts, and of the position of the Sheriffs-Substitute. It is understood that he suggested many of the alterations introduced by the Act of 1853, and he devoted much time and labour to secure a recognition of the claims of the resident Sheriffs to increased remuneration. In this, as in everything else, his work was quiet and undemonstrative. He was not a promoter of the agitation for the abolition of the double office, but he maintained that the Sheriff-Substitute should be enabled to live in a position somewhat commensurate with the importance of the duties he now has to perform, and that he should not be virtually deprived of the stimulus and encouragement which every man feels from the hope of professional advancement. His own promotion was, we believe, more valued by him as a practical proof that what he had so long contended for was now and again to be carried into effect, than on any other or more personal ground.

The Death of Professor Adolf Karl Von Vangerow will be heard of with sincere regret by many lawyers in this country. He was the best teacher of the civil law of Rome in Europe since Savigny, and his fame attracted to the University of Heidelberg students, not only from every quarter of Germany, but from every country where the value of the most perfect system of jurisprudence the world has yet seen is recognised. He was born in 1808 at a village in Hesse-Cassel, near Marburg, at the university of which he took the degree of Doctor of Laws

in 1830, and taught first as extraordinary and afterwards as ordinary Professor till his removal to Heidelberg, where he succeeded Thibaut as ordinary Professor of Roman Law in 1840. His chief works are his "Lehrbuch der Pandekten," and his "Leitfaden für Pandekten Vorlesungen," the former a systematic text book, and the latter a guide to his lectures, but distinguished by its subtle disquisitions on the most difficult points—the *apices juris*. Besides these, he wrote several small tracts, of which the best known is that on the "*Latini Juniani*," a contribution of some value to the student of Roman history, which more than any other history—except, perhaps, that of England—is an illustration of the saying of Montesquieu, "*Il faut éclairer l'histoire par les lois*." Vangerow was also for some time co-editor along with Linde and Mittermaier of the *Archiv für Civilistische Praxis*. He had felt the influence both of the historical school of Savigny and the dogmatic school of Thibaut, and though not so original as either of those jurists, in accurate knowledge of the text of the *corpus juris* he was probably the equal of both. Neither his erudition nor his genius as a writer can, of course, be compared to that of Savigny, who towers above his contemporaries and successors even more than they do above the professors of law in other countries. But as a teacher, in the opinion of many who have listened to some of the best living masters of that art, it was difficult to imagine his superior. He was full of vigour and liveliness; quick himself, yet patient of slowness in others; admirably clear in exposition, animated with a love of his subject, and a keen desire to impart the knowledge of it. To Englishmen who attended his lectures, it was often matter of surprise that so much talent, and the energy of a whole life, were devoted to such a subject as the civil law; but they at least had reason to be grateful for this devotion. The revival of this study in England will be in a considerable measure due to his influence. He received a fair share of the honours which German princes have been in the habit of bestowing on successful professors;—was a Privy Councillor of the Grand Duchy of Baden, and a Knight of the Grand-ducal Order of the Zähringen Lion.

We shall look forward with interest to the appointment of his successor. The rule of *detur digniori* is rarely violated in the choice of German professors, and it is to be hoped one may be found worthy to fill his chair and maintain the high position the Faculty of Law at Heidelberg has won amongst the universities of Europe. Scotch lawyers have seldom failed to acknowledge the value of the Roman law as a discipline and exemplar; and some of the present generation, while they feel their inferiority to their predecessors who studied the works of Cujas and of Voet, will not readily forget what they owe to this learned German.

Constructive total loss of Ship and abandonment of Freight.—The recent case of *Potter v. Rankin* in the Court of Exchequer Chamber is very instructive. The *Sir William Eyre* was bound to New Zealand, Calcutta, and England, and insurance was effected on chartered freight

from Calcutta to England. The ship sustained serious damage by sea perils in New Zealand; but the master and owners used their best endeavours to get her taken to Calcutta for repairs which could not be sufficiently effected in New Zealand. The ship arrived at Calcutta, and it was then ascertained that the damages were so extensive that the cost of repairing them would exceed her value when repaired. Notice of abandonment was forthwith given to the underwriters on freight. The Court of Common Pleas held that the plaintiffs (the owners) were not entitled to recover, because in order to recover as for a total loss on the insurance on freight, notice of abandonment was necessary; and secondly, because the notice given in this case was too late. The majority of the Court of Exchequer Chamber held that notice of abandonment was not necessary, and that had it been necessary, it was given in time.

On the important question where abandonment is, and where it is not, necessary, the case which goes furthest is that of *Roux v. Salvador*, 3 Bing. N. C. 266. There hides insured from Valparaiso to Bordeaux were, during the voyage, found to be in a state of incipient putridity, and sold at Rio for a fourth of their value. Abandonment was held to be unnecessary. Baron Cleasby, in *Potter v. Rankin*, regards that case as explained by *Knight v. Faith*, 15 Q. B. 659, and it is true that Lord Abinger treated the loss in *Roux v. Salvador* as absolute, and not constructive. Freight stands upon a peculiar footing, being necessarily dependent upon the safety of the ship. As to the general principle it was argued for the plaintiff, in *Roux v. Salvador*, on appeal, that the reasoning of the Court below came to this, that an abandonment is necessary, because it would be convenient for the underwriter to have early notice of the intention of the assured to call upon him, in order that he may the better prepare his defence, or exercise the rights belonging to him, as underwriter, with respect to the subject insured. This, it was added, would make a notice of abandonment necessary in all cases whatever of total loss, and an early notice of claim in all cases of partial loss; and, indeed, would require a prompt notice in all cases, whether arising out of contracts of insurance or not, where the defendant might be prejudiced by delay. The argument was that the necessity of notice of abandonment did not rest upon this principle. The Court of Exchequer Chamber agreed with this view, and reversed the decision of the Court below.

The true principle is stated by Emerigon (c. 17, s. 1.) who says that it appears absurd to renounce to the assurers a thing of which the absolute loss is already established. On the other hand, as Lord Cottenham says in *Stewart v. Greenock Marine Insurance Company*, 2 H. of L. Cas. 183, notice of abandonment is necessary in all cases in which the subject is not actually annihilated. And as Lord Chief Justice Cockburn said, in *Potter v. Rankin*, the rule as to notice must always be subject to the limitation that it attaches only where there is

something of appreciable value, however small that value may be, to relinquish to the underwriter. His words are these:—

“Thus, where goods are on board, and the ship becomes a constructive total loss, the shipowner, in order to claim for a constructive total loss on freight, must abandon to the underwriter the right to hire another vessel, and carry the cargo to its destination, and so earn the freight. But where the interest to be made over to the insurer is of so shadowy and unsubstantial a character that it cannot be supposed that it could have been of any benefit whatever to the underwriters, or that the latter, as reasonable men, would have thought of availing themselves of it, so that for all practical purposes abandonment would have been a merely idle and useless formality, the assured ought not, in my opinion, to be tied down to the necessity of giving notice of it, especially in these times when it is notorious that the practice of underwriters is never to accept the notice. Now, it is clear that the contract of affreightment was dissolved by sea perils. No freight could possibly be earned. There was therefore no freight to abandon to the underwriters.”

It is worth quoting the Lord Chief Justice's words on another point:—

“It has been suggested that there is a further ground on which the plaintiff's claim ought to be rejected, viz., that a shipowner who, having insured both ship and freight, abandons the ship to the underwriters on ship in order to claim for a constructive total loss, loses the right to claim on the policy on freight, inasmuch as by his own act he incapacitates himself from carrying on the cargo, and so earning the freight. This position appears to me to be altogether untenable in principle, and one which would lead to very inconvenient consequences. If correct, it would obviously be applicable to a case where the cargo on which freight was to be earned was already on board. It would equally apply to the case where the ship was not insured, but the owner, as a prudent man, declined to repair. It would tend to put an end to policies on freight altogether, as in every case of constructive total loss of the ship the policy on freight would be inoperative, unless the assured elected to repair the ship, which on the hypothesis, he ought not, as a prudent owner, to do. But the conclusive answer appears to me to be that the ship having been incapacitated from earning the freight by the peril insured against, and the owner not being under any obligation to repair her in order to earn the freight, but, on the contrary, as a prudent man, being justified in abandoning her, the loss of the freight in such a case does not arise from the act of the party.”

Appointment.—Since our observations on the claims of Sheriff-Substitutes were in type, it has been announced that Sheriff-Substitute Guthrie Smith has been appointed to the vacant Sheriffship of Aberdeen and Kincardine. Although it cannot be denied that some other claims have been unduly postponed, we hasten to congratulate the Parliament House and the Court, on the return to it, for the third time, of the *vivida vis ingenii* which has been too long lost in the cimmerian darkness of Dundee, of the ready and varied learning which sometimes found a use in an interlocutor sheet, but demands a larger field and greater interests for its proper exercise, and the genial manner and *savoir faire* which are the advocate's best aids in his progress to the highest pinnacles of his profession.

Obituary.—WILLIAM ALEXANDER LAURIE, Esq., W.S. (1823), Keeper and Superintendent of the Edinburgh Gazette, of Rossend Castle, Burntisland, died at Edinburgh, 26th October.

ALEXANDER JOPP, Esq., of Woodhill, Advocate in Aberdeen, died at Woodhill, Aberdeen, November 7.

DIGEST OF REGISTRATION CASES, 1869 AND 1870.

(See *ante*, Vol. xiii, p. 511).

I.—MISCELLANEOUS QUESTIONS.

Special Case, form of—Reform Act, 1861, sec. 22.—A special case should state the question of law, for the decision of the Court of Appeal. It should also contain a statement of the facts found by the Sheriff, and not a mere narrative of the evidence led before him. *Hilson v. Otto*, Oct. 28, 1870.

Failure to produce titles.—A person enrolled as proprietor was objected to, and his titles called for. Having failed to appear and produce his titles, though twice personally cited, or to offer any explanation of his absence, the Sheriff struck his name off the roll. On appeal, the Court (*dub.* Lord Ormisdale, in respect that the party was not certified, that on failure to appear his name would be expunged) affirmed the Sheriff's judgment. *Wier v. Blackwood*, Oct. 19, 1869.

Tenant of shootings.—A lease of shootings without a house does not afford a qualification for the franchise. *Dawson v. Watson*, Oct. 19, 1870.

Tenant—Occupancy—Company.—A company consisting of three partners occupied business premises under a lease in favour of the firm, until Whitsunday, 1869. Two of the partners then obtained a lease of the premises which stipulated that their occupancy should begin at that term. Objection to a claim to be enrolled by one of these two partners, that the occupancy truly continued with the company, out of the joint-purse of which the rent was paid, *repelled*, in respect there was no evidence that the occupancy of the two partners did not begin at the stipulated term. *Thomas v. M'Nab*, Oct. 25, 1870.

Proprietor—Deduction—Feu-Duty—Contingent Burden.—A superior fued out land in lots assigning a proportion of the feu-duty to each lot, but reserving his right to exact the cumulo duty from all. A vassal sub-fued a portion of one lot subject to the conditions of the original contract. Objection to a claim by the sub-vassal, that after deduction of the cumulo duty sufficient value was not left to entitle him to the franchise, *repelled*; the Court holding that the proportion of duty assigned to the lot part of which he had sub-fued, being the direct burden payable by him for his right, fell to be deducted from the value of the subjects claimed on, and not the cumulo duty which was merely a contingent burden. *Anderson v. Stewart*, Oct. 20, 1869.

Feu-Duty, return of, to assessor—County Voters' Act, 1861, secs. 4 and 8—Reform Act, 1868, sec. 16.—In a return made to the assessor under the former of these Acts, a person inserted his feu-duty as "none." The assessor placed him on his list of voters. Objection to his qualification that he had not supplied the assessor with information as to the amount of feu-duty paid by him, *repelled*; the Court holding (1) that the return adequately expressed an elusory duty, and (2) that to substantiate the objection it was necessary to prove that the voter's

feu-duty was not elusory, which the objector had failed to do. *Blackwood v. Moffat*, Oct. 24, 1870.

II.—QUESTIONS AS TO OWNERSHIP.

Superiority—Feu-duty—Reform Act, 1868.—A right to superiorities or feu-duties does not afford a qualification for the franchise under the above Act. *Baird v. Ballantyne*, Oct. 22., 1869.

Feu duties—Lands Clauses Act, sec. 126—Reform Act, 1832.—A superior was enrolled under the old Reform Act as proprietor of feu duties. His vassal sold to a railway company part of the feu, binding himself to relieve the company from all feu duties, &c., payable from the subjects sold. The superior was no party to the sale. Objection that under the above section the superior's right to exact feu duty from the lands sold to the company was abolished, provision being made for compensating him for the loss he thereby sustained; and that, therefore, only the proportion of feu duty corresponding to the subjects retained by his vassal, which was insufficient to afford a qualification, was now secured over land, the right to the remainder of the original duty being due only on personal obligation, *repelled* (*diss. Lord Ormisdale*). *Raeburn v. Geddes*, Oct. 28, 1870.

Proprietor—Beneficiary—Trust estate—Power of sale.—A beneficiary under a *mortis causa* trust, was enrolled a *pro indiviso* proprietor of certain subjects. Objection that the trustees had a power of sale, *repelled*—the power being only for the purposes of the trust which, with the exception of conveying the residue to the beneficiaries, had all been executed, without it having been necessary to dispose of the property.—*Stewart v. Campbell*, Oct. 21, 1869.

Proprietor—Sub-tenant under long lease—Reform Act, 1868, sec. 59.—Objection, to a person enrolled as "Proprietor," that he was sub-tenant under a long lease, and not in occupation of the subjects, *repelled*, on the ground that he fell under the term "proprietor," as used in the above Act. *Wylie v. Rev. P. Cairns*, Oct. 25, 1870.

Proprietor—Life-renter—Claim—County Voters' Act, 1861, secs. 2 and 44.—A life-renter presented a claim, under the Act of 1868, as "proprietor." The Sheriff, repelling objection that the claim was in respect of a qualification which the claimant did not possess, enrolled the claimant as "proprietor in life-rent." The Court, on appeal, affirmed the Sheriff's judgment, holding that the interpretation clause of the County Voters' Act, by which the term "proprietor" is declared to include "life-renter," was incorporated with the Act of 1868. *Hilson v. Douglas Home*, Oct. 28, 1870.

Proprietor—Title.—A written and stamped offer to purchase a house at a price payable by instalments extending over several years—a conveyance to be granted on full payment of the price—with power to the seller to resume possession on the purchaser's failure to implement his offer—together with relative acceptance, followed by possession, payment of instalments and outlay on improvements, *held* a sufficient title to entitle to the franchise as proprietor. *Stewart v. Flannigan*, Oct. 21, 1869.

Proprietor—Title—Reform Act, 1868.—A letter from the Exchequer Office intimating a gift of property from the Crown, of value sufficient to qualify, accepted by the donee, and followed by possession and repairs executed on the faith of the gift, *held* sufficient evidence to entitle a voter to remain on the register, although no formal deed of grant had been obtained. *Kilpatrick v. Reid*, Oct. 24, 1870.

Joint-owner—Reform Act, 1868, sec. 14.—On a construction of the above section, *held* that only two joint-owners acquiring right to subjects by purchase, or other singular title, could be placed on the roll in respect of such joint-ownership, but that, along with them, joint-owners holding shares of the statutory value acquired by inheritance, etc., might be enrolled in respect of their joint-interest. *Craig v. M'Kie*, Oct. 28, 1870.

III.—QUESTIONS AS TO TENANCY AND OCCUPANCY.

Tenant—Title.—A. agreed verbally in 1866 to assign a lease of a farm to B., who thereupon entered on the management of the farm. No written assignation was granted till April, 1869, and up to that date receipts for rent were granted by the landlord in name of A. Claim by B. to be admitted to the franchise *repelled*, sustaining objection that the claimant had no title. *Duncan v. Smith*, 21st Oct., 1869.

Tenant—Proof of occupancy—Assignation.—On objection that a person claiming to be enrolled as tenant and occupant of certain subjects had not occupied for the statutory period, the claimant produced an assignation to the subjects, dated eight months previously, bearing to assign the lease from and after a term two years before the date of the assignation, and offered to prove that he had been in the personal occupancy of the subjects for upwards of two years. The lessee stood on the valuation roll as tenant and occupant of the subjects. The Sheriff declined to admit the proof offered, and rejected the claim, holding that the claimant's right to be registered must be regulated by the date of the assignation in his favour. The Court, on appeal, affirmed the judgment of the Sheriff. *Rae v. Thomas*, Oct. 25, 1870.

Tenant—Bank agent—Defeasible tenure.—A bank agent was entered on the assessor's list as tenant of premises belonging to and connected with the bank, and which he held as part remuneration of his services as agent. Objection that his tenure was a defeasible one, *sustained*; the Court observing that there cannot be a qualifying tenancy where the occupancy is precarious. *Murray v. M'Gowan*, Oct. 20, 1869.

Tenant—Overseer—Defeasible tenure.—An overseer employed by the year stood on the assessor's list as tenant of a house. Objection, that he held the house as part of the stipulated consideration for his services, and could therefore be ejected at any time, *sustained*. *Deans v. Blackwood*, Oct. 18, 1869.

Tenant—Factor—Defeasible tenure—Evidence.—A factor, under a deed which declared that the factory should subsist until recalled in writing, was enrolled as tenant of a house. In support of an objection that the voter occupied the house as factor, the objector examined the

factor, who admitted the deed of factory, and that he occupied the house as part salary, but stated that the deed was qualified by a parole agreement rendering the factory revocable only on notice given by either party two months before Martinmas. *Held* (1) that the evidence of the factor could not be admitted to control the written deed, and (2) that under it the tenancy being defeasible could not afford a qualification. *Hilson v. Otto*, Oct. 28, 1870.

Tenant—Chaplain—Precarious tenure.—A military chaplain, receiving as part salary a dwelling-house, and removeable from his situation and house at any time without notice, *held* not entitled to the franchise as tenant and occupant of the house. *Rev. R. Cole v. Raeburn*, Oct. 25, 1870.

Tenant—Factor—Defeasible tenure—Onus.—A voter enrolled as tenant of subjects held by him as factor, was objected to in respect the factory bore to be revocable at pleasure. It was proved that, by the custom of the estate, the factor was entitled to continue to possess the subjects held by him until the end of the year in which the factory may terminate. The Court *repelled* the objection; holding that the objector had failed to discharge the *onus* which lay on him in objecting to a voter on the register. *Hilson v. Scott*, Oct. 26, 1870.

Liferent lease—Defeasible tenure—Entail—Jus tertii.—It was objected to a claimant as tenant in liferent of part of an entailed estate that his tenure was defeasible. The claimant admitted that the lease was granted by the heir-in-possession of an estate under an entail, containing the ordinary clauses against granting tacks of more than usual duration, and that it did not bear to be granted under the Montgomery Act, or under any other empowering statute. The Court sustained the objection: holding (1), that the objection was not *jus tertii*; (2), that the lease being defeasible by any subsequent heir of entail, did not afford a good qualification; and (3), that the objection was competently taken in the Registration Court, being instantly verified by the admission of the claimant. *King v. Mitchell*, Oct. 26, 1870.

Tenant—Sub-letting—Occupancy.—For six months of the year, one or other of the bedrooms of a temperance hotel had been occupied by a guest, who paid for it by the week *at a fixed rate*, and took his meals in the public room. Objection to the hotel-keeper's qualification that he was disqualified by sub-letting *repelled*—distinguishing between this (which it was remarked was rather the case of taking in a boarder) and the case of *Donaldson v. Brodie*, Dec. 19, 1868, *ante*, Vol. 13, p. 517, where the letting off of four rooms and a kitchen for part of the year, was held fatal to a claim as tenant of a house. *Blackwood v. Lessock*, Oct. 18, 1869.

Tenant—Sub-letting—Proof of value.—A tenant sub-let a portion of his house, in respect of which he was enrolled for a month, but the sub-tenant left after two days. On objection to his qualification, *Held* (1), that the personal occupation necessary to constitute tenancy of the whole subjects had been interrupted; but (2) that it was competent to prove otherwise than by the Valuation Roll, from which it could not appear, that the part retained was of value sufficient to qualify.

Question, whether there lay on the objectors the *onus* of proving that the value of the portion let was such as not to leave a qualification to the voter, or whether, on objectors showing that the value appearing on the roll had been infringed by sub-letting, the *onus* shifted, and the voters became bound to support their qualification by proving that the value of the subjects retained by them was of the statutory amount. *Brown v. Blackwood*, Oct. 20, 1869.

Tenant—Sub-letting—Proof of value retained.—On an objection to a claimant's qualification as tenant on the ground of sub-letting, *Held*, that the claimant, in proving value retained, was not limited to the valuation roll. *Reid v. Mathieson*, Oct. 22, 1869.

Tenant—Sub-letting—Value, proof of—Onus.—*Opinions*, that where an objector had proved that a voter, enrolled as tenant, had sub-let part of the subjects forming his qualification, the voter was bound to support his qualification by proving that he had retained subjects of the statutory value. *Donaldson v. M'Farlane*, Oct. 22, 1869.

Tenant—Sub-letting—Grazing Park.—It was objected to a claim, as tenant and occupant of a croft and cow park, that after deducting from the rent paid by him payments made to the claimant for allowing—as by his lease he was bound to do—the cows of other people to be grazed on the park for the season at a fixed rate, sufficient value was not left to afford a qualification. The Court *repelled* the objection. *Thomas v. M'Naughton*, Oct. 26, 1870.

Tenant—Joint-Tenant—Reform Act, 1868, sec. 13.—Claim by a person who had occupied subjects of the annual value of £25 6s. for six months as one of two joint-tenants, and for the rest of the year as sole-tenant, *rejected*. *Opinion* (per Lord Benholme) that the above section did not contemplate the creation of qualifications by the combination of tenancies of different kinds, but only of tenancies of the same character and of different subjects. *Stewart v. Scoullar*, Oct. 20, 1869.

Tenant—Combination of tenancies—Reform Act, 1868, sec. 13.—*Held*, that successive periods of occupancy of the same subjects as sole and as joint-tenant—the subjects being of value sufficient to qualify either a sole or a joint-tenant—might be combined to constitute a qualification for the franchise. *Blackwood v. Moffat*, Oct. 24, 1870.

Tenant—Combination of simultaneous tenancies—Reform Act, 1868, sec. 13.—*Held*, that it was competent to constitute a good qualification by combining simultaneous occupancy of two different subjects, the one of which was held as joint, and the other as sole tenant—although neither subject was of itself sufficient in value, if the united value was of the statutory amount. *Hilson v. Laidlaw*, Oct. 28, 1870.

Tenant—Combination of simultaneous tenancies—Reform Act, 1868, secs. 13 and 59.—*Held*, that it was competent to combine simultaneous occupancy of one subject as yearly tenant, and of another under a long lease to constitute a qualification—although under the above section tenancy under a long lease is held equivalent to proprietorship. *Observed*, that the section gave the tenant under a long lease the privileges of an owner if he desired them, but did not deprive him of his character as tenant. *Kirk v. M'Gowan*, Oct. 28, 1870.

IV.—REGISTER, CLAIMS AND OBJECTIONS.

Register, alteration of, by Sheriff—County Voters' Act, sec. 44—Valuation Roll—Value.—A person appeared on the Valuation Roll and on the Assessor's List as tenant of "house, joiner's shop, and yard," of the value of £15, but, as explained by the assessor, the subjects should have been entered as "house, joiner's shop, and field." On objection that the subjects on which the voter was enrolled were not of sufficient value, the Sheriff corrected the Register by substituting the word "field" for "yard," and *repelled* the objection. On appeal, the Court *held* (1) that the Valuation Roll was conclusive of value, and that neither the assessor nor an objector could be heard to contradict it, and on that ground *repelled* the objection; (2) that the alteration made by the Sheriff was incompetent; and (3) (*diss.* Lord Ormidale) remit made to him to restore the Register to its former condition. *Hilson v. Brown*, Oct. 28, 1870.

Register, alteration of, by Sheriff—County Voters' Act, 1861, sec. 44.—It was objected to a voter, enrolled as "proprietor," that he did not possess that qualification. To obviate the objection the voter moved the Sheriff to insert the word "joint" before the word "proprietor" in the description of his qualification. The Sheriff sustained the objection to the voter, holding that the alteration craved could not competently be made by him under the above section. On appeal, the Court *affirmed* the judgment of the Sheriff; observing that the proper mode of effecting such an alteration in the character of the qualification on which a person is enrolled, is by a new claim in the proper character, whereby due notice is given to all desirous to object. *Veitch v. Young*, Oct. 24, 1870.

Objection, timeous notice of, to party objected to—County Voters' Act, 1861, secs. 15 and 21.—*Held* (*diss.* Lord Benholme), that a notice of objection to a person objected to, which was posted on or before 4th September, and which did not reach its destination until after that day, was timeously given. *M'Creath v. Smith*, Oct. 22, 1869.

Claim, timeous notice of—County Voters' Act, 1866, secs. 9 and 15.—Notice of a claim was posted so as to arrive at the town where the assessor had his office at six p.m. on Sunday the 4th of September, being the last day allowed by statute for giving notice of claims. The post-office was shut on Sundays for giving out letters, except between one and two p.m., when letters could be had on application; on week days there was a delivery of letters at eight p.m. The notice was delivered at the assessor's office on Monday morning. Objection that the claim was not timeously intimated *repelled* (*diss.* Lord Benholme); Lord Ardmillan holding that, as the notice would have been duly received by the assessor had the 4th been a week day, and as it was competent to give notice on Sunday, the non-delivery resulting from the 4th falling on a Sunday did not affect the sufficiency of the notice; and Lord Ormidale, proceeding on the more general ground, that intimations by post are timeously given if the letters containing them arrive at the post-office of the town where the assessor has his office on the 4th of September, although they should be too late either to be delivered or obtained by application that day. *Morton v. Reid*, Oct. 26, 1870.

Notes of Cases.

COURT OF SESSION.

FIRST DIVISION.

HOSEASON v. HOSEASON.—October 21.

Aliment.—Action for aliment by Mrs Mary Anderson or Hoseason, widow of Hosea Hoseason, junior, who had liferented the small estate of Aywick, in Shetland, against Robert Hoseason, nephew of her deceased husband, and present owner of the estate. The estate belonged to Hosea Hoseason, senior, father of pursuer's husband, who left it to his eldest son Hosea, junior, in liferent and his heirs male, whom failing, to his second son James. James took the estate on the death of his eldest brother, in 1833, without male issue, and it was now in the hands of his son Robert. Defence—(1) that a father was not bound to aliment his son's widow; and (2) that, even supposing that Hosea, senior, if he had been in life, would have been bound to aliment pursuer, no such liability lay on defr. The L. O. (Gifford) sustained the first plea for the defr., and dismissed the action.

The Court unanimously adhered, holding the question to be conclusively settled against pursuer by the authorities.

Act.—Speirs. Agent—J. A. Gillespie, S.S.C.—Alt.—Cheyne. Agents—Stuart & Cheyne, W.S.

RITCHIE v. RITCHIE.—October 22.

Sheriff—Process—Act of S. 1839—Appeal for Jury Trial.—Appeal from Sheriff Court of Banffshire in a petition by Mrs Christina Wilson or Ritchie, against her husband, praying the Sheriff to ordain him to deliver up an ante-nuptial contract between them, which she averred that he had carried off from a trunk in which she kept it, and which he broke open for that purpose. On 20th July, 1870, the S. S. (Gordon) allowed petr. a proof, and appointed the proof to proceed on July 29. Respt. appealed, but the Sheriff adhered, and the S. S. of new appointed 4th August, for proceeding with the proof. Respt. did not appear, having presented a note of appeal under s. 40 of the Judicature Act, and the S. S. having taken proof in his absence, found that on 3d Dec., 1863, petr. and respt. had signed an ante-nuptial contract of marriage, which was not recorded; that it was handed to petr., and placed by her in a chest which she locked, and kept within a locked clothes-press, the keys of both of which she kept; that towards the end of June last, respt. broke open said press and chest, and abstracted therefrom said contract; and ordained him within six days to produce in process said contract, and, on failure to do so, remitted the process to the Procurator-Fiscal. On appeal, the Sheriff adhered, and it was now brought before the Court along with the appeal, under s. 40 of the Judicature Act.

Apart from a question as to the propriety of the Sheriff's closing the record upon a minute of defence, instead of allowing condescendence, as

to which the Court had no difficulty at all in holding that the S. S. was quite right, the only question of importance was whether appt. was entitled to bring the cause to this Court under the Judicature Act.

The Court held that the allowance of proof by the Sheriff-Substitute on July 20, was the time at which the provisions of s. 40 of the Judicature Act applied, and a party desiring to avail himself of that enactment ought not to appeal to the Sheriff. So far as concerns claims where the value appears on the face of the proceedings to be above £40, the A. of S. of 1839 contemplates a postponement of the proof for fifteen days; but where it did not so appear, it was impossible to require the S. S. so to postpone the proof, and it could not be maintained that the proof here was improperly taken on the fifteenth day. Where the value did not appear on the face of the proceedings, the only A. of S. which applied was that of 11th July, 1828, s. 5, providing that where the claim is above £40, but not simply pecuniary, a party desiring to advocate is to apply to the Sheriff by petition, and afterwards make a declaration as to the value, upon which the Sheriff grants leave to remove the cause for jury trial. It was the duty of the party wishing to do so at once to present a petition. Here the party, instead of doing so, appealed to the Sheriff, and so lost six days. Then, the S. S.'s interlocutor standing, both the S. S. and petr. might conclude that they were entitled to proceed with the proof. Accordingly, the proof went on competently, and respt. must take the consequences. The proceedings had been quite regular; but still, in a case of this serious character, which might eventually be tried before an entirely different tribunal, the Court allowed respt. to lead before Lord Ardmillan any additional evidence he had to tender before pronouncing judgment on the merits.

Act.—Keir. Agent—George Andrew, S.S.C.—Alt.—Asher. Agent—A. Morrison, S.S.C.

PTN.—DAVYS.—October 29.

Entail—Disentail—Consents.—Petition for authority to disentail by an heir of entail born in July, 1849, who claimed to be entitled to acquire the estate in fee simple, without the consent of any subsequent heirs. The L. O. (Mackenzie) ordered the petition to be served on the three next heirs, but as petr. objected, reported the case to the Court. Petr. contended that, under s. 2 of the Rutherford Act, no consents were required, and no service on following heirs of entail.

Held, that no service was required in such a case by the statute. S. 36 did not apply, and the question what intimation was to be made beyond that required by s. 34, was one for the discretion of the Court. The heir had to establish, as a condition of his obtaining the authority prayed for, his full age, his birth after August, 1848, and his possession of the estate under the tailzie. As to these points the Court must be fully informed whether or not there be a contradictor; but they were matters which any party interested, any heir of entail, might appear and deny. The L. O. therefore had wisely exercised this discretion in the circumstances of the present case. The names of the three next heirs ought, however, to be given in the petition.

Act.—Duncan. Agents—Murray, Beith, & Murray, W.S.

DUKE OF ATHOLE v. POSTMASTER-GENERAL, &c.—Nov. 2.

Post Office Act—Toll—Exemption.—Action was brought under the Dunkeld Bridge Act, for tolls alleged to be due upon the mail-gig carrying the mail between Dunkeld and Kenmore in 1851. The defence was rested on the clause of the Post Office Act of 1838, providing that no turnpike toll or tolls should be leviable on any two-wheeled vehicle carrying only Her Majesty's mails and a driver. The first question raised in argument was—Whether the toll on the bridge fell under the description of a turnpike toll? and the second was—Whether the vehicle used in conveying the mails was deprived of its privileges by having been used for carrying parcels and passengers in addition to the mails, not when crossing the bridge, but between Kenmore and Inver, which is 500 yards from the bridge? Upon the first question, *Held*, aff., the L. O. (Gifford) that the toll or pontage leviable on Dunkeld Bridge was within the meaning of the clause of the Post Office Act. Upon the second question, *held* (L. Pres. diss.) that the right to such an exemption was not to be judged of merely at the moment when the vehicle passed the turnpike and the toll, but that the statute had in view a carriage constructed merely for the purpose of carrying the mails, and employed only for that purpose during the whole course of the contract journey.

Act.—*Millar, Lee. Agents—Tods, Murray, & Jamieson, W.S.—Advocatus, Sol.-Gen. Clark, Burnet. Agent—John Cay, W.S.*

JAMES ROSS FARQUHARSON, PETR.—Nov. 2.

Entail—Lease.—Petition for authority to grant a lease for nineteen years of part of the lands of Invercauld, the entail of which prohibited leases for more than one year in favour of certain parties for behoof of Her Majesty. It appeared from the reports in process that the ground (the forest of Ballochbuie) was of no agricultural or grazing value, and was only valuable for purposes of sporting. The questions were raised—(1) Whether a lease of shooting was a proper lease to which the Act was applicable? (2) Whether it was a long lease in the sense of the 24th section of the Entail Act, 11 and 12 Vict., and of the Amending Act of 16 and 17 Vict.? *Held*, (L. Deas diss.) that these enactments were applicable to the lease, and that it was expedient to grant the authority prayed for.

WALLACE v. FISHER & WATT.—Nov. 4.

Reparation—Negligence—Agent and Client.—Walter Wingate was lessee of a seam of coal in pursuer's lands of Easter Shirva, under a fifteen years' lease from 1860. In Jan., 1862, Wingate formed a co-partnership with Mr George Cadell Bruce, which was to subsist during the continuance of the said lease. At a meeting in the office of defrs., in Jan., 1862, pursuer, Wingate & Bruce, directed defrs., who were pursuer's law agents, to prepare a minute of agreement whereby Wingate was to declare that the lease stood in his person only in trust for Bruce and himself. A draft minute of agreement was accordingly prepared, and having been approved of by the parties, was returned to defrs. to be extended. The pursuers in extending it added to it a clause, which had been introduced by Wingate & Bruce, expressing the pursuer's approval, the words "but without prejudice to his (pursuer's) legal rights," without communicating with any of the parties. The deed was

sent to pursuer to be signed, who did so and sent it to Wingate that it might be subscribed by him and Mr Bruce. At the request of pursuer, defender wrote twice in November following to Wingate, asking him to return the deed to be completed, but got no answer and did nothing more in the matter. In May or June, 1864, Wingate absconded, and pursuer applied to Mr Bruce for the rents; but Mr Bruce disputed his liability, and denied that he was joint-tenant of the colliery. The pursuer was unable to recover the deed, but relying on its ultimate recovery, sued Bruce & Wingate in the Court of Session for arrears of rent, and for damage for letting the colliery be flooded. In that action Bruce was assoilzied; on the ground that he had never seen the alteration in the draft, and that it was not proved that he had ever seen or signed the extended deed. In the course of this litigation pursuer intimated to the defenders that he held them liable to relieve him of loss occasioned by their failing to carry through the agreement with Bruce, and afterwards brought the present action to recover the expenses of the action against Bruce. The L. O. (Ormidale) found defrs. liable to reimburse the pursuer in the expenses incurred by him in the action against Mr Bruce, proceeding substantially on three grounds—(1), That defrs. as agents failed in their duty in respect that they did not get the deed executed after it was extended; (2), that they had no right at their own hand to add the clause above-mentioned to the draft which had been revised by the parties; (3), that they failed to inform Mr Wallace of the fact that this addition had been made. Defrs. reclaimed. The Court delivered opinions containing an elaborate review of the evidence, and reversed the judgment of the L. O. and assoilzied the defenders.

Act.—Fraser, Moncrieff. Agents—Hill, Reid, & Drummond, W.S.—Alt.—Watson, Trayner. Agent—P. S. Beveridge, S.S.C.

DAVIE, &C., v. THE FRIENDLY SOCIETY OF COLINTON, &C.—Nov. 10.

Friendly Society—Jurisdiction.—Reduction by certain members of the society of a minute of meeting dated 14th October, 1864, diminishing from three years to one year the probationary period on the expiry of which the members became entitled to participate in the benefits of the society, and also of the certificate of the Registrar of Friendly Societies approving of said alteration of the rules, and declarator that cards of freedom granted to members who had been less than three years in the society at the dates thereof were null and void. The L. O. (Mackenzie) dismissed the action, holding that the jurisdiction of the Court was excluded by the rules of the society and by 18 and 19 Vict., cap. 63. The rules of the society provided for the settlement of “all disputes between the society or any person acting under them, and any individual member thereof, or any person claiming on account of any member,” by arbitration. The Friendly Societies Act provided that all disputes between any member or members and the society should be settled “in the manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal” (sec. 40). Further, even if the questions raised were not such as were to be submitted to arbitrators, the L. O. held that pursuers were not entitled to bring this action in the Court of Session, because s. 41 provides that “all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other

mode of settling such disputes," shall be decided by the County Court in England or the Sheriff in Scotland. His Lordship, accordingly, on this ground, also held the action to be incompetent in the Court of Session.

Pursuers reclaimed.

Lord President—It had been contended that the registrar's certificate barred challenge of the rules on the ground of irregularities in calling the meetings at which they were adopted, but he could not adopt that view. The statute only declared that the rules of a friendly society should have no binding effect till they were approved by the registrar; and he even thought it was no part of the registrar's duty to inquire whether a change in the rules had been carried out with all the requisite conditions. His Lordship did not think that the action was excluded by the rules as to the settlement of disputes between members by arbitration. But the third ground of judgment adopted by the Lord Ordinary was more serious. Looking at s. 41 of the Act of 1855 by itself, it was difficult to understand the limits of the privative jurisdiction thereby conferred on the Sheriff; but looking at the history of legislation on the subject from the Act 10 Geo. IV. downwards, he had no doubt that the Sheriff's jurisdiction was intended to be privative in the class of cases mentioned. It was said that the challenge of this minute and certificate must be by reduction; an action which is incompetent in the Sheriff Court; but such technical difficulties must yield to the express words of the statute.

The other Judges concurred—Lord Deas and Lord Ardmillan expressing doubt as to the Lord President's view that it was no part of the duty of the Registrar of Friendly Societies to make any inquiry as to the formality of the proceedings of the society in adopting rules. The Court adhered to the L. O.'s interlocutor dismissing the action. [Note for reference; *Leisg v. Reid*, 39 L. J., Ch. i.]

Act.—Advocatus, Mackay. Agent—Alex. Morison, S.S.C.—Alt.—Shand, Balfour. Agent—W. Traquair, W.S.

GOURLAY, & CO., v. WATT AND MACMILLAN.—Nov. 10.

Sale—Contract—Construction—Warranty—Fraud—Issue.—Thomas Gourlay, shipowner, Glasgow, and others, raised this action against William Watt, shipowner, Dumbarton, and John Macmillan, shipowner and ship-builder there, for £9000 as damages on account of defrs. having failed to implement a contract in the following circumstances:—In Jan., 1869, defrs., the owners of the ship *Spray of the Ocean*, sold her to pursuers under a sale note, which stipulated that she was "to be classed A1 at Lloyd's from the date her first-class certificate expires, with sails repaired, for the sum of £5600—£2000 cash down, and balance when finished. The ship to be at our (sellers') risk till out of the Leven." The ship, which had been built in 1854, and was then classed A1 for thirteen years at Lloyd's, was lying for repairs in defr.'s slip at Dumbarton. On 19th February she was delivered, and the whole price paid, and defrs. obtained the certificate required by the contract from Lloyd's. The ship having sailed with a cargo from Glasgow to Bombay, pursuers in this action averred that she proved to be unseaworthy from rot and decay, not from sea damage, and that she was now lying at Rio Janeiro, and totally worthless, the cargo having been forwarded by another vessel at a cost of £1500. Pursuers having proposed issues, the L. O. (Ormidale) dismissed the action as irrelevant, holding that the

written contract, which was not to be modified by parole, and related to the sale of a specific existing article, was subject to the rule *caveat emptor*, and that it included no warranty by the sellers except that the ship should be classed A1 at Lloyd's, which had been done. His Lordship held pursuers' allegations of fraud and falsehood to be too vague to be issuable.

Pursuers reclaimed, and were allowed to amend their averments as to fraud and misrepresentation.—*Held*, that the action, so far as laid upon breach of contract, was irrelevant. All the allegations upon this part of the case were consistent with perfect good faith and honesty on the part of defrs., and it was admitted that they had fulfilled the contract, which was only to get the ship classed A1 at Lloyd's. The second ground of action—viz., that defrs. had fraudulently induced the pursuers to take delivery of the ship sold—while she was not truly in the condition stipulated—was in a different position as the record now stood, and pursuers were entitled to an issue upon it.

Act.—Sol.-Gen. Clark, Watson, Maclean. *Agents*—J. & R. D. Ross.—*Alt.*—*Advocatus*, Shand, Asher. *Agent*—James Webster, S.S.C.

LOCHRUAN DISTILLERY CO. v. ANDERSON.—Nov. 15.

Cautioner.—Pursuers, in 1867, appointed defr.'s son to be agent for the sale of their whisky in Dundee—his father, in a letter, "undertaking that he should faithfully and promptly account for all moneys or bills which he might receive" on business account—"it being understood that my liability is limited to £300 sterling; and that he shall be required to account to you monthly for his intromissions, or oftener when practicable; and that, should any irregularity occur, you will be bound to give me early notice thereof, for my guidance and protection." This action was brought against the cautioner for loss sustained by the pursuers, to the extent covered by the letter of guarantee. Defence was that pursuers had failed to communicate some irregularities of the agent during the period of his agency, and that they had not exercised due supervision over their agent. The L. O. (Gifford) held that defr. had failed to prove against pursuers any breach of the conditions of the guarantee, or that they had otherwise relieved him from his bargain. The Court adhered.

Act.—Fraser, Lancaster. *Agents*—Murray, Beith, & Murray, W.S.—*Alt.*—Miller, Burnet. *Agents*—J. & J. Milligan, W.S.

MUIR v. KERR, &C.—Nov. 16.

Fraud—Relevancy.—Reduction of a bill accepted by Kerr, of the proceedings in Kerr's sequestration, and of an assignation by the trustee in his sequestration, to David Kyle of Kerr's rights in certain property at Dalry sold by the trustee, and purchased by Kyle. The L. O. (Guthrie) sustained defr.'s plea that the summons was irrelevant, and dismissed the action, holding that as the proceedings in the sequestration were *ex facie* regular, nothing short of distinct allegations of Kyle's knowledge at the time of the purchase of the fraudulent proceedings which are said to have led to the sequestration could entitle pursuer to an issue. Such averments were not to be found in the record, nor did pursuer add them when allowed an opportunity of amending. The Court adhered.

Act.—Millar, Rhind. *Agent*—W. Officer, S.S.C.—*Alt.*—Balfour. *Agent*—A. K. Mackie, S.S.C.

SECOND DIVISION.

SCOTTISH LEGAL BURIAL AND LOAN SOCIETY v. LEITCH.—Oct. 18.

Friendly Societies Act—Sheriff—Jurisdiction.—Appeal from the Sheriff Court of Renfrewshire in an action by the executor of a deceased member of appt.'s society, concluding for payment of a certain sum as due upon that member's death. Defrs. pleaded, *inter alia*, that the proper parties had not been called as defrs. The S. S. sustained this plea. The Sheriff altered and repelled it. The S. S. then allowed proof. On appeal, the Sheriff found proof unnecessary, and decerned in favour of pursuer. Defrs. having brought the present appeal, pursuer objected to the competency in respect that under the Friendly Societies Act the Sheriff's judgment was final. To this it was replied (1), that pursuer had put himself without the statute in respect he had brought a summons in the ordinary form instead of a summary proceeding, as prescribed by the Act; (2), that the judgment of the S. S. was final, and the appeal to the Sheriff-Principal incompetent in respect that, while either S. S. or Sheriff could exercise the jurisdiction given by the Act to the Sheriff of the county, that did not imply that the one Judge should review the other.

The Court held the appeal incompetent, being of opinion (1), that there was no particular form of process prescribed by the Act, although the proceeding was directed to be summary; (2), that whatever might be the right of the Sheriff to review the decisions of the S. S. under the Act, no finality applied to judgments of the S. S., which were merely interlocutory, or did not decide the dispute between the parties. The Lord J. C., while concurring in the result, held that the finality was co-extensive with the jurisdiction, but that it attached not to the decisions of any particular Sheriff, but to those of the Sheriff-Court, proceeding according to its ordinary procedure.

Act.—Trayner. Agents—Campbell & Smith, S.S.C.—Alt.—Millar, R. F. Campbell. Agents—Neilson & Cowan, W.S.

MORRISON AND NEWALL v. HARKNESS.—October 20.

Guarantee—Agent and Client—Mercantile Law Amendment Act.—Appeal from the Sheriff Court of Dumfriesshire. Pursuers had held a bond over property in Moffat belonging to John and James Henderson. The Hendersons having become bankrupt, Mr Tait, writer in Moffat, became trustee on the estate of the one, and Mr Gun, solicitor, Dumfries, on that of the other. Defr. was agent in Dumfries for Tait, and in that character he negotiated with the agent of pursuers for the payment and discharge of their bonds. Under these bonds, pursuers had given notices with a view to the exercise of their powers of sale, and pursuers' agent having declined to discharge the bond except upon payment of the expenses incurred in connection with the notices, defr. granted him an obligation in the following terms:—"I will see the above account settled, when taxed, reserving Mr Gun's plea." This reservation related to an objection taken by Mr Gun to pursuers' right to incur the expenses in question. The point in the present appeal was whether pursuers were entitled to claim payment from the defr. under his obligation, without first constituting their claim against Tait and Gun, or at least discussing with Gun the objection which had been reserved.

The S. S. and Sheriff decided in favour of defr., and dismissed the action. The Court altered, and found that the terms of the obligation gave the pursuers, both at common law and under the Mercantile Amendment Act, a direct action against defr.; and that the only effect of the reservation was to entitle defr. to state in this action, if he pleased, the objection to the account that had been taken by Gun. The account was accordingly remitted to the auditor for taxation, with power to inquire into and report upon any objection which defr. might take to the account, founded upon the reservation contained in the obligation.

Act.—Johnstone. Agent—R. P. Stevenson, S.S.C.—Alt.—Millar, M'Kie. Agent—W. S. Stuart, S.S.C.

PAXTON v. NORTH BRITISH RY. CO.—Nov. 1.

Reparation—Carrier.—Appeal from the Sheriff-Court of Midlothian. The appt., a farmer at Tillicoultry, sued for £40, as the damage sustained by the death of a brood mare, delivered by him to respts. to be carried from Drem Junction to Tillicoultry, and found dead on her arrival there. It appeared that the mare in question had been taken to Drem Station and tied up in a horse-box, not in the way usually adopted, but somewhat more loosely; further, that this was done by pursuer himself and one of the porters of the company, and that he expressed himself satisfied with the mode of tying-up followed. On arriving at Edinburgh, the mare was found dead, and it appeared as if she had fallen or been thrown on her back, and been choked in consequence.

The S. S. and Sheriff decided in favour of the company, holding that there was no evidence of fault, and that proof of fault was essential. The Court altered; and while affirming the necessity of proof of fault, yet found that the company, undertaking the carriage of the pursuer's mare, was bound to see that she was properly trucked, and that it appeared from the evidence that the mare's death arose from having been improperly tied up.

Act.—Watson, Johnston. Agents—Millar, Allardyce, & Robson, W.S.—Alt.—Advocatus, Sol.-Gen. Clark. Agents—Dalmahoy & Cowan, W.S.

CROMBIE AND BISSET v. ERSKINE'S TRUSTEES.—Nov. 1.

Landlord and Tenant—Lease—Stipulation to leave green crop—Valuation.—Appeal from the Sheriff-Court of Kincardineshire. Pursuers were trustees of Erskine, farmer, Pitarrow, and as such were tenants of the farms of Pitarrow and Mill of Corweth, under leases which expired at Martinmas 1868. Defrs. were the landlord and incoming tenant. At the expiry of the leases there was a quantity of turnips on both farms, and in terms of the leases these fell to be delivered over at valuation by the outgoing tenant to the landlord or incoming tenant. The question was as to the principle on which the valuation should be made, pursuers claiming to have the turnip crop valued at what it was worth for removal and sale in the market, and defrs. claiming to have it valued at what it was worth for consumption on the farm. The valuation had been made under arrangement by the arbiters on both principles, and pursuers brought the action, concluding for what was due to them upon the principle for which they contended.

The S. S. (Dove Wilson) found for the pursuers, holding that, in the absence of any reason to the contrary, a stipulation to leave turnips or anything else belonging to one person to be taken and paid for by another at

valuation, means that the article is to be valued at what it will bring when freely sold in the market, and that defrs. had shown no reason why the clauses in the lease should not receive their natural meaning.

Defrs. appealed, but the Court adhered.

Act.—Sol.-Gen. Clark, Watson. Agents—Alex. Crombie, W.S.—Alt.—Decanus, Millar. Agent—Wm. Officer, S.S.C.

TEMPLETON v. GLASGOW AND S. W. RY. CO.—Nov. 1.

Police Assessment—13 and 14 Vict., c. 33—Railway.—Appt. was collector of police assessment for the police burgh of Maybole, and brought the present action in the Sheriff Court of Ayrshire, in order to recover from respts. their proportion of police assessments of the said burgh for the year from Whitsunday 1865 to Whitsunday 1868. Respts. denied liability on the grounds that railways did not come within the term "premises," which alone could be assessed under the Act 13 and 14 Vict., cap. 33; and that, moreover, there was no machinery existing prior to the passing of the recent Act of Parliament for assessing railway property within burghs. The S. S. (Robison) found that defrs. were liable to the assessment, in respect both of their station accommodation and the portion of their line within the burgh. The Sheriff (Campbell) altered, holding that the word "premises" could not be applied to the mere line of railway, and that the assessment was only exigible in respect of the station buildings. The Court to-day returned to the S. S.'s judgment.

Act.—Decanus, Lees. Agents—Muir & Fleming, S.S.C.—Alt.—Advocatus Johnston. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

LOCALITY OF CAMERON—GRAHAM BONAR v. LORD ADVOCATE.—Nov. 3.

Teinds.—The question in this case was whether the objector, Mr Graham Bonar, is or is not barred by the plea of *res judicata* from now raising and trying the question whether the teinds of the parish of Cameron, which, on the abolition of Episcopacy in 1689, belonging to the Archbishopric of St Andrews, and which now belong to the Crown, are or are not to be postponed in the allocation of stipend to the teinds of the parish held upon heritable rights.

The objector maintained, in point of law, that although the teinds now in the hands of the Crown belonged to the Archbishopric of St Andrews in 1689, they are not entitled to the privileges of Bishops' teinds, because they did not originally belong to the Archbishopric of St Andrews, but were only mortified and granted to that Archbishopric by King Charles I. in 1635. According to the objector, the only Bishops' teinds entitled to the privilege of not being locally so till teinds held as heritable rights are exhausted, are teinds which were Bishops' teinds at the Reformation, or at least long prior to 1635. Respt. (the Lord Advocate), as representing the Crown, disputed this doctrine of the objector, but pleaded further, as a preliminary plea, that the question had been finally decided in the Crown's favour in a previous locality of the parish, and in a process of reduction at the instance of the objector's author.

The L. O. (Gifford), on a consideration of the previous proceedings, sustained this plea of *res judicata*. The objector reclaimed, but the Court adhered. The judgment proceeded entirely upon the facts.

Act.—Watson, Hall. Agents—Dalglish & Bell, W.S.—Alt.—Sol.-Gen. Clark, Kinnear. Agent—W. H. Sands.

LINDSAY (TROWSDALE & SON'S TRUSTEE) v. FORCETT RAILWAY
COMPANY.—*Nov. 4.*

Jurisdiction—Arrestment ad f.j.—In this case, the question was whether pursuer, who is the trustee in the sequestration of certain railway contractors at Peebles and Innerleithen, had effectually founded jurisdiction against defrs., an English railway company. The alleged jurisdiction rested on (1) an arrestment of certain books and documents belonging to defrs. in the hands of their agents, Messrs Graham & Johnstone, W.S.; (2) an arrestment of £14 odds due to defrs. by Mr Robert Tennant of Ballachulish. Defrs. maintained that the first arrestment was invalid as a foundation of jurisdiction, in respect (1) that the books and documents were in the hands of Messrs Graham & Johnston for a limited purpose, the pursuer having himself got them done for the purpose of examination, and returned them to Messrs Graham & Johnstone for transmission to their lawful custodiers; (2) that books and documents had no commercial value, and could not be the subject of arrestment. With regard to the arrestment defrs. maintained that it also was invalid, in respect that Mr Tennant (the arrestee), although having heritable property in Scotland, was not a domiciled Scotchman, and therefore that his debt to defrs., an English company, was in no respect a Scotch debt.

The L. O. (Jerviswoode) sustained the jurisdiction. Defrs. reclaimed. The Court altered, and sustained the pleas stated by the defrs. as respects both the arrestments founded on, and dismissed the action.

Act.—Advocatus, Lancaster. Agents—Lindsay & Paterson, W.S.—Alt.—Watson, Maclean. Agents—Graham & Johnston, W.S.

FORBES v. WATT'S TRUSTEES.—*Nov. 9.*

Lease—Process—Amendment.—Declarator and removing by Mr Forbes of Hadds, in Banffshire, against the trustees of the late Charles Watt, alleged tenants of Mains of Crombie and Tillyfaff. The main question was as to the validity as a title to defrs. of two leases, dated in the end of the last century, and of certain relative writs by which the said leases were said to have been transmitted.

In 1784, the Earl of Seafield, who was then proprietor of pursuer's estate, let to Cosmo Dawson the lands of Mains of Crombie, "for two nineteen years, and thereafter for the lifetime of a person to be named by the person in possession of the lease in the thirty-eighth year thereof." In 1785, Lord Seafield further let to the same individual the lands of Tillyfaff, which he had previously possessed along with the Mains of Crombie, the duration of this second lease being declared to be "for the same space of time as the tack now granted of the Mains of Crombie." In 1825, Adam Dawson, the son of Cosmo Dawson, intimated to the Earl's factor that he nominated the life of Robert Wilson for the endurance of the lease of Mains of Crombie. This Robert Wilson is still alive, and in virtue of his nomination, both Mains of Crombie proper and Tillyfaff continued to be possessed by the Dawsons and their successors down to the raising of the present action, in which the pursuer (who bought the estate in 1859) pleaded that, for a variety of reasons, the rights under both leases had long since come to an end, and, at all events, that the nomination of 1825 did not apply to Tillyfaff, because

(1) it was limited to the farm of Mains of Crombie, which did not include Tillyfaff; and (2) the thirty-eighth year of the lease of Tillyfaff was 1823 and not 1825.

The L. O. (Ormidale) found on all points in favour of defra.; holding that any ambiguities in the original leases had been cleared up by the possession, and that any flaws or informalities in the transmissions to defra. had been obviated by adoption and homologation. Pursuer reclaimed, but to-day the Court (L. Neaves diss. as regards Tillyfaff) adhered. Pursuer having then proposed to raise a question (to which, as alleged, part of the proof had been directed) as to the boundaries of defra.' possessions—the Court further held that that question could not be raised under the summons as it stood, and refused a motion for leave to amend so as to include it.

Act.—Sol.-Gen. Clark, Shand, Asher. *Agent*—Alexander Morrison, S.S.C.
—*Alt.*—Scott, Maclean. *Agent*—John Walls, S.S.C.

MACFARLANE v. ANSTRUTHER AND OTHERS.—Nov. 10.

Succession—Executor.—Action by a beneficiary under the settlement of Dugald Anstruther, ship-owner, Port-Glasgow, who died in 1843, against the executrix-dative of the said Dugald Anstruther, and the representative of her cautioner, to recover the share of the succession belonging to pursuer. The conclusions of the summons were directed in the first instance against the executrix, and in the event of failure to recover from her after due discussion, then against the representative of the cautioner. The latter pleaded (1) that there had been no due discussion by the executrix, any discussion that there had been being merely collusive; (2) That the cautioner had been liberated by the lapse of twenty-seven years from the date of his bond, without demand either on him or on the principal debtor; and (3) That there had been transactions between the pursuer and the principal debtor, by which, if the debt had not been paid, the cautioner had at all events been liberated.

The L. O. (Ormidale), after proof, sustained the first of these defences, and granted absolutor. The pursuer reclaimed. The Court sustained the second and third defences, reserving their opinion on the first.

Act.—Rhind. *Agent*—James Barclay, S.S.C.—*Alt.*—Shand, Maclean.
Agents—J. and R. D. Ross, W.S.

STEWART v. STRACHAN.—Nov. 10.

Diligence—Failure to produce.—Appeal from the Sheriff-Court of Banffshire. An action depended in that Court against Mr Stewart of Auchlunkart, at the instance of one of his tenants. In making up the record, a diligence was obtained by pursuer for the recovery of certain documents, copies of which were in process. Defr. having been examined as a haver, made a long and rambling statement, the exact import of which it was difficult to construe, but did not produce the documents. The S. S. having advised his deposition, held that it implied an admission that the documents were in his possession, and accordingly ordered him to produce them within ten days, under certification that if he failed decree would be pronounced by default. Defr. still failing to produce, decree by default was pronounced. This was affirmed by the Sheriff-Principal. The Court re-called the Sheriff's decerniture, reserving all

questions of expenses, and held that the proper penalty for defr.'s failure to produce was to hold the copies of the documents in process as equivalent to the originals.

Act.—*Decanus, R. V. Campbell. Agents—Maitland & Lyon, W.S.*—*Alt.*—*Asher, H. J. Moncreiff. Agent—Alex. Morrison, S.S.C.*

HAGART v. FYFE.—*Nov. 15.*

Property—Foreshore—Interdict—Jurisdiction.—Appeal from Renfrewshire. Hagart presented a petition against Mr Fyfe, ropemaker, Port-Glasgow, setting forth that petr. was bound by his lease to enclose four acres of ground lying on the banks of the Clyde, for the purpose of a timber-yard, and that while he was in the course of sinking posts for that purpose, respt. cut down some of these posts, and threatened to destroy the whole of them, and craving interdict against his so doing. The question was thus raised whether Mr Hair, petr.'s landlord, had right to grant a lease of the shore ground between high and low water mark.

The S. S. (Tennent) found that petr. had not produced any title to the sea-shore ground, and dismissed the petition, holding that, no title to the foreshore being produced, the attempt to prove that his lands were on the shores of the Clyde, and by inference that the foreshore must be included in his grant, was of the nature of a declarator, which was incompetent in the Sheriff Court; and that the allegations of possession could not be proved, as no title was alleged. The Sheriff (Fraser) adhered.

Petr. appealed. The Court dismissed the appeal, holding that there were no sufficient allegations of possession to entitle petr. to proof, but it was necessary to decide the general question.

Act.—*Black, Innes. Agent—T. Landale, S.S.C.*—*Alt.*—*Watson, Macdonald. Agent—Adam Shiel, S.S.C.*

OUTER HOUSE.

(Lord Jerviswoode).

M. P.—MACDONALD v. CUMMING, &c.—*Nov. 15.*

Ultima hæres—Conflict of Laws.—William Cumming, a domiciled Scotchman, and a bastard, died in 1845, survived by his wife and by one child. The widow survived the child, and both died intestate. In 1846, Cumming's estates were sequestrated, and the trustee realised the estate and paid the creditors in full. He now brought this multiplepoining to have the balance in his hands judicially disposed of. The bankrupt had acquired from the New Zealand Land Company 300 acres of land in New Zealand, his title to which consisted of land orders or certificates. The multiplepoining included this land and some heritable estate in Scotland. A claim was lodged by the brother and two sisters of the widow, claiming the real estate in New Zealand, or the proceeds by the Law of New Zealand and law of England and inheritance Act, 3 and 4 Wm. IV., cap. 106, and statute 22 and 23 Vict., cap. 35, ss. 19 and 20, which they averred apply to New Zealand. They maintained that the right to the real estate vested

in the only child, by his survivance of his father; and that on the death of the son, and in respect of his father being a bastard, and the son having died intestate and without heirs, the right became vested in his mother, and that as heir of the last purchaser or party entitled to succeed, and whether she or her son did or did not obtain the possession or receipt of the rents of the real estate.

On the other hand, the Commissioners of the Treasury claimed the fund, on the ground that, by the law of New Zealand, the son had no heir, and there was escheat to Her Majesty as *ultima hæres* of both father and son, in respect the imperial statute 22 and 23 Vict., cap. 35, was not adopted by the colony in 1862, when the son died. The L. O., after hearing parties, remitted to a Queen's Counsel in England, who has given his opinion, that, although 22 and 23 Vict., cap. 35, has not been adopted by the colony, by virtue of the Inheritance Act 3 and 4 Wm. IV., cap. 106, the mother, in the circumstances, was the heir of her son, and that her representative was entitled to the proceeds of the New Zealand lands, and that there was no escheat to the Crown. The L. O. has given effect to this opinion in a judgment which has been acquiesced in, the Crown being preferred to the heritable estate in Scotland, and the competing claimants to the proceeds of the New Zealand lands.

Act.—W. A. Brown. *Agent*—J. Richardson, W.S.—*Alt.*—J. A. Crichton, Hutchison. *Agents*—Crawford & Guthrie, S.S.C., A. Mackintosh, S.S.C.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTHSHIRE, DUNBLANE.— Sheriffs TAIT and GRAHAM.

MOIR v. MOIR.

Judicial Factor for Pupil—Executor-Dative qua Factor.—James Moir died, leaving moveable property within the county of Perth. He was survived by a widow and only child, in pupillarity. The widow presented a petition to the Commissary, to be appointed executor to her deceased husband. To this application there was no opposition, but some days before the date of decerniture the widow died. The pupil was thereupon taken in charge by his maternal uncles and aunt, who presented a petition to the Commissary, craving that one of the petitioners should be appointed to the office of factor for the pupil, with power to obtain himself decerned executor-dative qua factor for the pupil as next of kin of his father. The S.S. pronounced the following interlocutor and notes:—

The Commissary having considered the foregoing petition, for the appointment of the said James Drummond, to be factor for the said Alex. James Moir, a pupil, Finds that it is not competent for the Commissary to make the appointment craved: Therefore, refuses the prayer of the petition, and decerns.

Note.—The authority for making the appointment craved does not appear to be within the jurisdiction of the Commissary. In the general case of

appointments to the office of judicial factor, it has never been questioned that the appointment of such an officer belongs exclusively to the supreme Court; and, though in the case in which the office of a factor has been petitioned for, with the view of the party appointed being afterwards decerned to the office of executor to act for a pupil, there has been a practice in some of the Commissary Courts to make such an appointment, still that practice appears to have arisen only from the circumstance of the Commissary Judges having been in former times the bishops of the church; and it must be remembered that, in respect of their ecclesiastical authority, they in early times exercised in such matters a general control, which has long since ceased to be recognised, or attempted to be in any way exercised. Apart from the authority so exercised by the bishops in early times as Commissary Judges, there appears to be nothing to support the view that the lay Judges, to whom the discharge of the office of Commissary has now been entrusted, can take upon himself, what, according to the principles of our law as long recognised, and lately given special effect to in the Pupils' Protection Act, belongs exclusively to the Judges of the supreme Court. In one case indeed, viz., that of *Johnston v. Louden*, etc., 15th Feb., 1838 (16 S.), an appointment of a factor to a minor by a Commissary Court, was apparently recognised as not necessarily invalid; but an examination into the circumstances of that case, and the grounds of action, and the opinions of the Judges, will show that the question of the authority of the Commissary Court to appoint to the office of factor, was not made matter of decision. The pursuer in that case was a minor, who had been decerned executrix-dative to her sister, and who had in that character, along with her curators and her mother (who had been appointed factrix, to the effect of being confirmed to act for her said child under the executry), asked for payment of a legacy due to the executry. The Judges held that the minor had a good title to demand payment of her sister's legacy, as sister and executor-dative qua nearest in kin, and on that ground alone sustained the title of the minor.

"Were the appointment of factor by the Commissary Court to be recognised as legal, and were it generally acted upon, means would be afforded of nullifying to a great extent the safeguards intended to be given to the public by the provisions of the Pupils' Protection Act, the policy and intention of which is, that parties holding the office of a judicial factor shall be responsible to the Court of Session for all their intromissions with, and management of, the pupils' estate, and the performance of every duty incumbent on a party holding the office of a judicial factor. The special protection which was intended to be given to pupils by the appointment of an accountant of Court, who should superintend generally the conduct of judicial factors, would thus be lost in the case of all factors appointed by the Commissary, and the estates of pupils might thus, under the colour of an appointment obtained by a party, with the pretence of his afterwards getting the office of executor, be mismanaged.

"Taking, then, into account the fact that the authority which is claimed for the Commissary Court, in regard to the appointment of judicial factor, had an ecclesiastical and episcopal origin which it has not been the policy of recent legislation to recognise, and that the Pupils' Protection Act is founded on the principle that the Court of Session is the protector of all pupils, the mere *obiter dicta* of some of the Judges on a point which they

held not an essential one in the case before them, do not appear to be of sufficient authority to warrant the Commissary Court to exercise the extraordinary powers involved in the appointment now prayed for."

The petitioners having appealed against this interlocutor, William Moir, the paternal uncle of the pupil, and his next of kin, lodged a caveat, craving to be heard as an objector. The Sheriff appointed intimation of the original petition and S.S.'s interlocutor to be intimated to William Moir, and allowed him to sist himself as a party to the action, and to answer the petitioners' reclaiming petition. Petrs. having answered thereafter, the Commissary recalled the interlocutor of the S.S., and remitted to him to appoint the petition to be intimated in common form, and to proceed thereon in the usual way.

Note.—The Sheriff Commissary has made special inquiry as to the practice in this matter in the different Commissariats. He finds the appointment of factors, with a view to their being decerned executors, where the nearest of kin is a pupil, and where there is no widow of the deceased, is universal; and, in the commissariat of Edinburgh, there are instances of this having been done within the present year. It is possible that since the passing of the Pupils' Protection Act, the Court of Session may find that they only are competent to appoint factors in such circumstances; but they have not as yet done so, and seem hitherto to have acquiesced in the continuance of the ancient practice. The Commissary clerks must, no doubt, look well to the sufficiency of the security found; and, if that be done, there may be an advantage, where the executry is small, in the appointment being made by the Commissary, in whose Court the proceedings as to decerning executor and confirmation are to take place, instead of a more expensive application to the Court of Session. After the due intimation is made, the propriety of appointing the person proposed in the petition, or some other person, to the office of factor, will be considered.

It is stated in the answers for William Moir, the comparear, that he himself, as the paternal uncle of the pupil, has presented a petition praying that he should be decerned executor to his deceased brother, and that the said application has been sisted until the present petition is disposed of, seeing that Alexander James Moir, the pupil, is the son and nearest of kin of the deceased, the Commissary does not see how the brother can be decerned executor, unless he has first been appointed *factor* for that purpose. But there is nothing to prevent him from presenting a petition that he should be appointed factor; and, if he does so, that petition may be considered along with, or even conjoined, with the present petition. Probably an agreement may be made between the parties, the only object being that the executry be secured, and the confirmation proceeded with for the benefit of the pupil.

Act.—D. Keay.—*Alt.*—J. M'Lean.

SHERIFF COURT OF LANARKSHIRE, GLASGOW.—*Sheriffs*
GLASSFORD BELL and NEAVES.

BOILERMAKERS' SOCIETY v. M'MILLAN.—*October 22.*

Friendly Societies' Acts—Trades' Unions—Process—Title to sue.—The United Society of Boilermakers and Iron Shipbuilders of Great Britain and Ireland, and the members of the Executive Council (named in the summons), sued M'Millan for £16 9s 6d, being money belonging or payable to the society uplifted by defr. from members of the society at various times to pursuers unknown, and illegally kept by defr. and applied by him to his own purposes, and for which defr. granted to the society the I O U referred to in the summons. The defence substantially was (1) pursuers have no title to sue, and (2) the objects of pursuers' society are unlawful, and interfere with the freedom of trade and labour by constraint and intimidation, and it was therefore argued that the pursuers' society could not hold property, nor sue for funds. On Nov. 15, the S.S. held that pursuers' society was founded on some rules which were illegal, as being in restraint of trade, and also that its rules were not registered or certified under the Friendly Societies' Acts, and therefore sustained the first plea in law for defr., and dismissed the action. But on 17th May last, the Sheriff recalled this interlocutor, and found (1) that, though some of the rules of a trades' union were illegal, that did not prevent them from holding property and suing for it at common law; and (2) that pursuers did not sue under the Friendly Societies' Acts, but at common law, and that it was therefore only necessary to inquire whether the action was properly brought at common law, and remitted to the S. S. to hear parties on this point. The question now came to be, whether a society or trades' union, composed of a large number of members, and not registered under the Friendly Societies' Act, could sue and be sued by its committee of management, or whether (as the old law was understood to be) all the members must be called.

The following interlocutors were pronounced:—

Glasgow, June 21, 1870.—The S.S. having heard parties' procurators and made avizandum, repels the preliminary plea stated for the defr. in so far as not already disposed of, and appoints the case to be put to the debate roll of Wednesday, June 29.

Glasgow, October 17, 1870.—Having heard parties' procurators on the defender's appeal, and resumed consideration of the whole process, Finds that it is admitted by the defender in his Minute of Defence, article 5, that the I O U No. 6-1 founded on in the summons was granted by him, and the said document is addressed to the pursuers' society: Finds that the instance bears to be that of the said society and also of its chairman, treasurer, and secretary, together with four other members who constitute, with the three first-named office-bearers, the whole members of the Executive Council:—Finds that it is instructed by rule 39, sect. 1 of the society's rules, of which No. 6-2 is an admitted copy, that the Executive Council has "the general management of the society": Finds, first, that as the said I O U was granted to the society, of which the pursuers are the Executive Council, the society and members of Council are entitled on this ground alone to sue the defender for payment of the debt therein acknowledged: Finds, second, and *separatim*, that the old doctrine that a voluntary

association could neither sue nor be sued unless the whole members were set forth in the summons, has undergone a large modification; and wherever it appears that the members are so numerous that the enforcement of the rule would amount to a practical denial of justice, it is now held that the action may be competently brought by or directed against the office-bearers, managers, directors, or executive by whose acting the society is understood to be bound. See in particular *Somerville*, July 8, 1862, *Jurist*, vol. xxxiv., p. 619; also, *London, Leith, and Edinburgh Shipping Company*, June 19, 1841; and *Sea Insurance Company of Scotland*, Feb. 17, 1827: Finds that the pursuers' society consists of upwards of 50,000 members, who could not come or be brought into Court in any other way than through their managers or representatives: Therefore adheres to the interlocutor appealed against, and dismisses the appeal.

Note.—In the case of *Somerville*, above referred to, it was expressly held that a voluntary association was competently sued in name of the committee of management; and it was laid down by the Bench, that where the difficulty of bringing all the members into the field was so great as to amount to a practical impossibility, it was obviated by calling as the parties the members of the committee for the time intrusted with the whole charge and superintendence of the society's affairs. There is also great force in the observation of the Sheriff-Substitute (the late Mr Charles Neaves, whose recent and sudden death has been so much and justly lamented), that in granting the I O U "the defender has declared himself to be a debtor not to any particular branch of the society, but to the society at large, described in that document as 'The Boilermakers' Society of Great Britain and Ireland,' which document of debt is now sued on by the chairman and all the other important office-bearers of the society, in whom it cannot be doubted the general administration of the society's affairs is vested, and who are in possession of the document which they now produce."

Act.—*W. B. Faulds.*—*Alt.*—*W. M. Wilson.*

English Cases.

WINDING UP—Unregistered Company—Debtor and Creditor—Acceptance of new debtor—Novatio.—An unregistered company which had ceased to carry on business or to have any place of business before the Companies' Act 1862 came into operation, is nevertheless liable to be wound up under the 198th section of the Act. The F. Society contracted with P. in consideration of premiums payable for a limited period to pay him an annuity to commence after the premiums should cease. P. paid all the premiums, and received the earlier payments of his annuity from the Society. The Society afterwards transferred all their assets to the A. Company, and the A. Company took upon themselves all the engagements of the Society; after this P. received the payments of his annuity from the A. Company until the latter stopped payment. Upon the petition of P. for an order to wind

up the F. Society:—*Held*, that he had not accepted the A. Company as his debtors instead of the F. Society, and that he still remained a creditor of the latter.—*In re The Family Endowment and Annuity Society*, 39 L. J. Ch. 306.

PRESUMPTION—*Time of death within seven years*—*Title*—*Onus probandi*.—There is no presumption of law as to the time when a person, who has not been heard of for seven years, died; though at the expiration of that period he must be presumed to be dead. There is no presumption of law that a person proved to be alive at a given time, remains alive until the contrary is shown. Where a title depends upon the fact of survivorship of one of two persons at a particular time, the *onus probandi* lies on the person claiming under such title. A testator by his will gave the residue of his estate to his nephews and nieces equally, and died on the 5th of January, 1861. One of his nephews was a sergeant of marines in the American navy, and on the 16th of June, 1860, was treated as a deserter by not returning to his ship upon the expiration of a leave of absence. He was never afterwards heard of. The last letter received by his family from him was dated the 15th of August, 1858. Letters of administration to his estate were granted on the 24th of April, 1869:—*Held*, by Giffard, L. J., that his administrator was not entitled to any share of the testator's residuary estate.—*Lamb v. Orton, Re Benham's trusts, Dunn v. Snowden, and Thomas v. Thomas* overruled.—*In re Phene's Trustees*, 39 L. J. Ch. 316.

PATENT—*Sale in England of goods manufactured abroad by process patented here*.—The importation into this country and sale here of goods manufactured abroad by a process patented in this country is an infringement of the patent.—*Elmslie v. Boursier*, 39 L. J. Ch. 328.

ADMINISTRATION OF ESTATE—*Policy of Assurance*—*Debtor and creditor*.—A., the agent of B., to whom he had lent money, effected policies on B.'s life, and paid from time to time the premiums upon them. A., in a memorandum kept by him, charged B.'s account with the premiums, but there was no evidence that this account was ever communicated to B., or that B. was aware that the premiums were being charged against him. Under these circumstances:—*Held*, on appeal, by L. Hatherley, C., that the policies could not be treated as between A. and B.'s estate, as having been effected by A. for B.'s benefit, and as held by him in trust for B.'s estate.—*Bruce v. Garden*, 39 L. J. Ch. 334.

EVIDENCE—*Attempt to suborn witnesses*.—The fact that one of the parties to an action, who is not himself examined as a witness, has requested other persons to make false statements at the trial, may be proved as evidence against his whole case, as being equivalent to an admission by him that it is not a good and genuine one. And it makes no difference that the party thus attempting to procure false testimony is bringing the action not on his own account, but for injuries done to his wife.—*Moriarty v. London, Chatham and Dover Rail. Co.*, 39 L. J. Q. B. 109.

NEGLIGENCE—*Warranty against negligence of independent contractor*.—Where money is paid by spectators at races or other public exhibitions for the use of temporary stands or platforms, there is an implied warranty on the part of the person receiving the money, that due care has been used in the construction of the stand by those whom he has employed as inde-

pendent contractors to do the work as well as by himself. The following passages are from the judgment of the Court, delivered by Hannen, J.:—

Deft., acting on behalf of himself and others interested in the Cheltenham Steeple-chases, entered into a contract with Messrs Eassie, by which they engaged to erect and let to defts. a temporary stand for the accommodation of persons desirous to see the races. The stand having been erected deft., on behalf of himself and his colleagues, received money from visitors for the use of places on the stand. Messrs Eassie were competent and proper persons to be employed to erect the stand; but it was in fact negligently erected by them, and in consequence of its being so negligently erected, it fell, and plt. who had paid for admission, and was upon the stand, was injured by the fall. Neither plt. nor the deft. knew of the improper construction of the stand. We think it clear that deft., by receiving money from plt. as the price of his admission to the stand, entered into some engagement with him with reference to its condition; but in order to determine whether deft. is liable in damages for the injury which plt. has sustained, we have to consider what the extent of that engagement was. The nearest analogy to this case seems to be afforded by that of carriers of passengers. The carrier is paid for providing the means of transporting the passenger from place to place. Deft. received payment for providing the means of supporting the spectator at a particular place. This distinction does not appear to give rise to any difference of principle between the contracts to be implied in the one case and in the other as to the safety of the means provided for carriage or support. The recent decision of the Exchequer Chamber affirming the judgment of this Court in *Redhead v. The Midland Railway Company*, L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 623, has established that there is not in such a case any implied warranty that the carriage provided is in all respects fit for its purpose. But that decision, while it gives confirmation (if any were needed) to the proposition that the carrier undertakes that he has used due care in providing safe means for the conveyance of the passengers, expressly leaves undetermined the further question whether the carrier also undertakes that due care has been used by those who have contracted with him to provide the means of conveyance. In the present case, it is not found that deft. was himself wanting in due care, and no power to draw inferences of fact is given to the Court, and, if it were, we should not be able to draw the inference that deft. was personally guilty of any want of care. He had employed competent and proper persons who had efficiently executed similar work on previous occasions. The circumstance that deft. did not himself survey or employ any one to survey the stand after it was erected, does not in itself establish the charge of negligence; for it does not appear that the defect was such as could have been discovered on inspection; and even if it had been, it cannot be laid down as necessarily a want of care not to inspect, although it would in some circumstances be evidence from which a jury might properly find that due care had not been taken. It becomes necessary for us therefore to consider whether the implied contract by deft., was that due care had been used, not only by deft. and his servants, but by the persons whom he employed as independent contractors. It is said in the judgment of the Court of Exchequer Chamber in *Redhead v. Midland Railway Co.* that "warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and

with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given." Applying this rule, we think that the contract by deft. with plt. did contain an implied warranty that due care had been used in the construction of the stand by those whom deft. had employed to do the work, as well as by himself. In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage, or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person was, and in no case has any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulation and take what securities he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier: (*Longmeid v. Halliday*, 6 Ex. 766). Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without a remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract has caused the mischief. We are also of opinion that the weight of authority is on plt.'s side. All the cases bearing on this subject are collected and commented on in the judgment in *Redhead v. The Midland Railway Company*. It will only be necessary to refer to a few of them. In the earlier decisions the language of the Judges is, perhaps, ambiguous. Thus in *Christie v. Gregg*, 2 Camp. 81, Sir James Mansfield says: "The carrier did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down of the coach was purely accidental, plt. had no remedy for the misfortune he had encountered." Taken strictly, this would support plt.'s contention, because if the manufacturer whom the carrier employed was guilty of negligence, the undertaking was not fulfilled that the carriage should be safe "as far as human care and foresight could go." But it is just possible that Sir J. Mansfield meant "as far as human care on the defendant's part could go." The same remark is applicable to what is said by Best, J., in *Crofts v. Waterhouse*, 3 Bing. 319, 320. But it is clear that Alderson, B., in *Sharp v. Grey*, 9 Bing. 459, considered that the carrier of passengers was liable not only for those defects of construction which he might himself guard against, but also those which arise from want of care on the part of the maker. But in *Grote v. Chester*, 2 Ex. 255, the point now under consideration was distinctly raised. There an accident happened from the defective construction of a bridge over a railway, for the erection of which the company had employed a competent engineer. It was left to the jury in effect to say whether the engineer, as well as the company, had used due care and skill. For defts. it was objected that they would not be liable unless they had been guilty of negligence; and after verdict for plt. it was argued for defts. that as they

had engaged the services of the most competent engineer in the construction of the bridge, they had done their duty; upon which Parke, B. said, "It seems to me that they would still be liable for the accident, unless he also used due and reasonable care, and employed proper materials in the work." And later, with reference to the case of *Sharp v. Grey* (*ubi sup.*) he says, "The coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coach-maker." And the Court held that the jury had been properly directed, saying, "It cannot be contended that defts. are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge." In *Burns v. Cork and Bandon Ry. Co.*, 13 Ir. Com. L. Rep. 543, the same point appears to have been raised upon the pleadings. The action was for not carrying the plaintiff safely. Defts. pleaded that the cause of the accident (a defect in a crank pin) was not capable of being detected by them, and that the crank was purchased from competent manufacturers, and that defts. before the journey duly examined the crank, and had no notice of the defect. To this plea plt. demurred. The Court gave judgment for plt., holding the plea bad because, amongst other reasons, it did not contain any averment negating carelessness on the part of the manufacturers. Pigott, B. says, "If defts. had been the manufacturers of the engine they would have been bound to aver and to prove that due care and skill had been exercised in the process of its manufacture. Are they to be relieved from legal liability because they allege that they have purchased it from a competent manufacturer? See also *Wightman, J. in Brazier v. The Polytechnic Institution*, 1 F. & F. 509.—*Francis v. Cockrell*, 39 L. J. Q. B. 113.

CARRIERS BY RAILWAY—*Passenger's Luggage.*—Plt. and others went by defts.'s railway from London to Newmarket, taking the servant of one of the party with them. The servant afterwards returned by the same way, taking with him the luggage of the party, including the portmanteau of the plt., and obtaining an ordinary passenger's ticket for the defts. Plt. did not return by the same train as the servant. The portmanteau was lost during the journey by the negligence of the defts.:—*Held*, that they were not liable at the suit of plt., as any such liability must be forwarded on contract, and they had only contracted to carry the ordinary luggage of the servant, and not that of plt.—*Becher v. G. E. Ry. Co.*, 39 L. J. Q. B. 122.

CONTRACT—*Construction of—Architect as Arbitrator.*—By a contract between plt., a contractor, and defts., a burial board, plt. contracted to construct certain works for the defts., on their land, by a certain time, and for a specified sum, subject to various conditions, by one of which the architect, according to whose plans the works were to be executed, had power to give further drawings and to order further works to be executed. By another of the conditions the architect was empowered to grant an extension of time, if by reason of additions to the works or for any other cause arising with defts., with the architect or his clerk, or in consequence of any unusual inclemency of weather, or for want or for deficiency of any orders or drawings, or by reason of any difficulties, obstructions, disputes or differences, plt. should, in the opinion of the architect, have been unduly delayed in the completion of his contract; and by another of such conditions it was provided that it should be lawful for defts., in case plt. should fail in the

due performance of any part of the undertaking, or should become bankrupt or compound with his creditors, or should not in the opinion and according to the determination of said architect, exercise due diligence and make such due progress as would enable the works to be effectually completed at the time contracted for, to determine the contract and take possession of the works. Plt. sued defts. for wrongfully refusing to permit plt. to complete the above contract, and defts. pleaded a justification under the last-mentioned condition, alleging that plt. failed in the due performance of certain parts of his undertaking, and did not in the opinion, and according to the determination of said architect, exercise due diligence and make such due progress as provided in and by that condition, and as would have enabled the works to be effectually and efficiently completed at the time and in the manner provided by the contract. Plt. replied that his alleged failure was caused and occasioned by the delay and default of defts. and their architect in supplying plans and drawings, and in setting out the lands and defining the roads and giving such particulars as would enable the plt. to commence the works. Defts. rejoined that the non-exercise by plt. of such due diligence, and the not making by him of such due progress were not, in the opinion and according to the determination of the architect, caused by the acts and orders or by the neglect of defts. and their architect, and further that the said opinion and determination of the architect were formed after due consideration of the facts and circumstances relating to such failure:—*Held* (diss. Pigott, B., and Cleasby, B.), that the determination of the architect on the question whether plt.'s failure was caused by the delay and default of defts. to supply the plans and set out the lands, was not by the contract made binding on plt., and therefore, that the replication was a good avoidance of the plea as shewing that defts. were taking advantage of their own wrong, and that the rejoinders were no answer to such replication.—*Roberts v. Bury Improvement Commissioners*, 39 L. J. C. P. 129 (Ex. Ch.)

SHIPPING—General Average.—In order to establish a claim to general average against the owner of cargo, the shipowner must shew a common risk existing, and a voluntary sacrifice or extraordinary expenditure incurred for the joint benefit of both ship and cargo. If, therefore, goods be landed from a stranded ship, and deposited in a place of safety, from whence they may be shipped again in another vessel and carried to their destination, without greater expense to the owner of the goods, or deterioration to the goods themselves, so that it is indifferent to him by what ship they go forward, extraordinary expenses subsequently incurred in floating the stranded vessel do not constitute general average to which the owner of the cargo is bound to contribute.—*Walthew v. Mavrojani* (Ex. Ch.) 39 L. J. Ex. 81.

MARINE INSURANCE—Prospective freight—Total Loss—Notice of Abandonment.—A ship being chartered for a voyage to New Zealand, thence to Calcutta, and from Calcutta to London, the owner effected an insurance on the chartered freight from Calcutta to London, but the insurance was only for the preliminary voyage to New Zealand. The ship, during such preliminary voyage, got aground, and sustained such damage as would have justified the owners, had they been then aware of the actual extent of it, in abandoning the vessel and treating the loss as a constructive total loss, but though several surveys were held on her after arrival at New Zealand, there were no means there of ascertaining her real condition, as it was necessary

for that purpose that she should be taken into a dry dock or put on a patent slip, neither of which existed at New Zealand. The surveyors recommended certain repairs being done, and that the ship should be put in a dry dock or on a slip, at the nearest available port, for further examination; but they did not state that they apprehended she had sustained any extensive damage beyond what had been ascertained, and they advised the captain to proceed in ballast on his voyage as soon as the necessary repairs pointed out had been completed. The vessel was partially repaired, and proceeded in ballast to Calcutta, where, on putting her into dry dock, her real condition was ascertained. On the owners being informed of this, they at once gave notice of abandonment to the underwriters both on the ship and on freight, there having been also an insurance on the ship. The accident to the ship had occurred in May and June, 1863, and she might have left New Zealand in the following September, but for the captain not having sufficient funds to effect the necessary repairs; this deficiency of funds arose from great expenses which had been incurred in getting the vessel off from where she had grounded, and in meeting claims of passengers for breaches of the Passengers' Act, and of consignees of the outward cargo for damage thereto; and also from the unwillingness of the owner's agents at New Zealand to advance what was required without specific directions from the owners to do so. When at length these directions arrived, the money was advanced and the ship repaired without further delay; but the result of it altogether was, the detention of the ship at New Zealand to the 14th of April, 1864, on which day she left for Calcutta:—*Held*, by Cockburn, C. J., Kelly, C. B., Channell, B., and Lush, J., that sufficient notice of abandonment of freight was given, if such notice was necessary in order to recover as for a total loss on the insurance on freight. *Semble*, per Cockburn, C. J., and Lush, J., that no notice of abandonment was necessary, inasmuch as the ship, never having been ready to receive the chartered cargo, there was nothing to abandon to the underwriter on freight. *Semble*, per Kelly, C. B., and Channell, B., that as there was a constructive total loss of the ship, it was impossible for its owners to earn the chartered freight, and there was therefore an actual and not a constructive total loss of such freight. *Held*, by Cleasby, B., that there had not been such a total loss of the freight as to entitle the assured to recover without notice of abandonment, and further, that the delay at New Zealand was unjustifiable as against the underwriter, and that therefore the abandonment of the freight was too late.—*Potter v. Rankin*. (Ex. Ch.), 39 L. J. C. P. 147.

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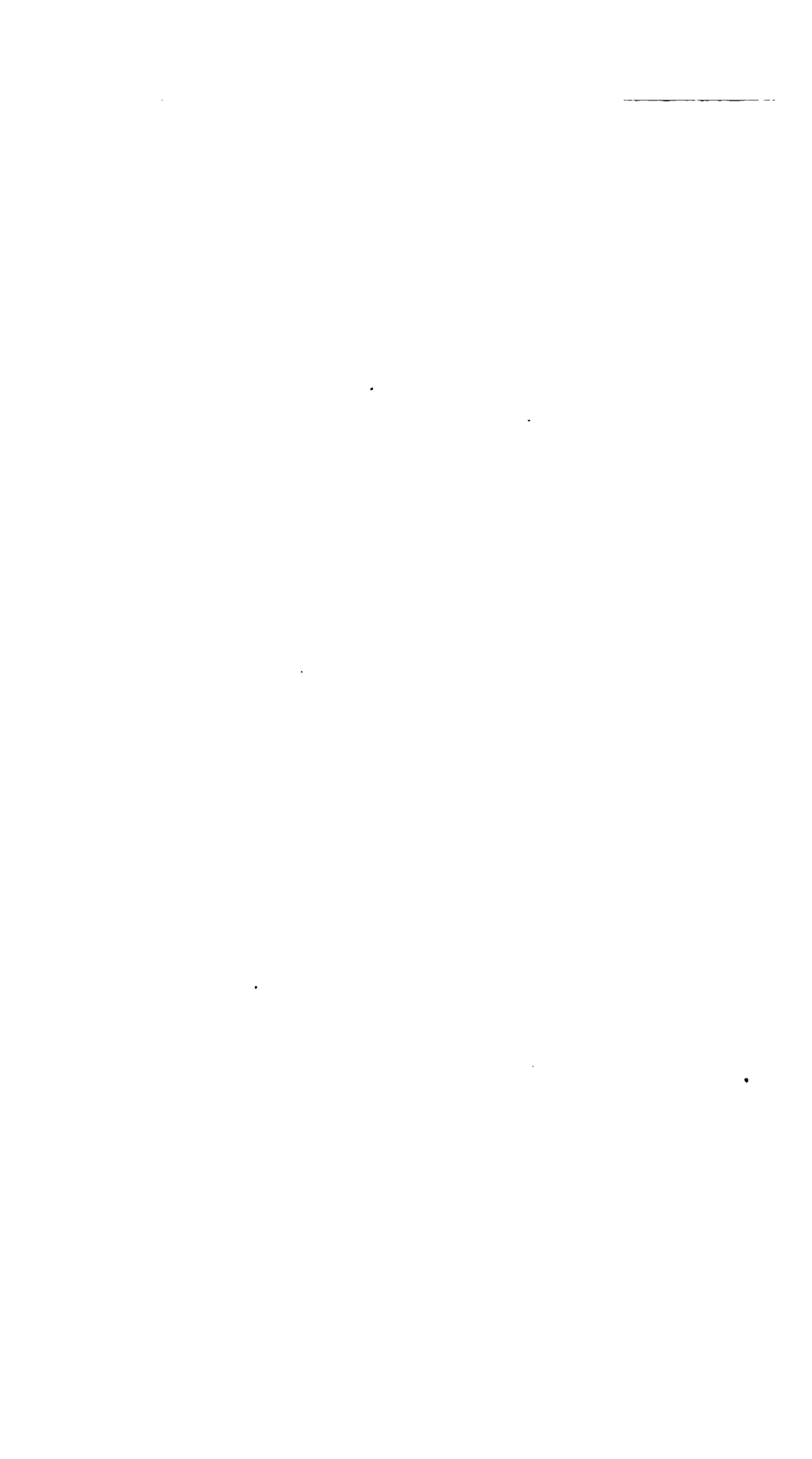
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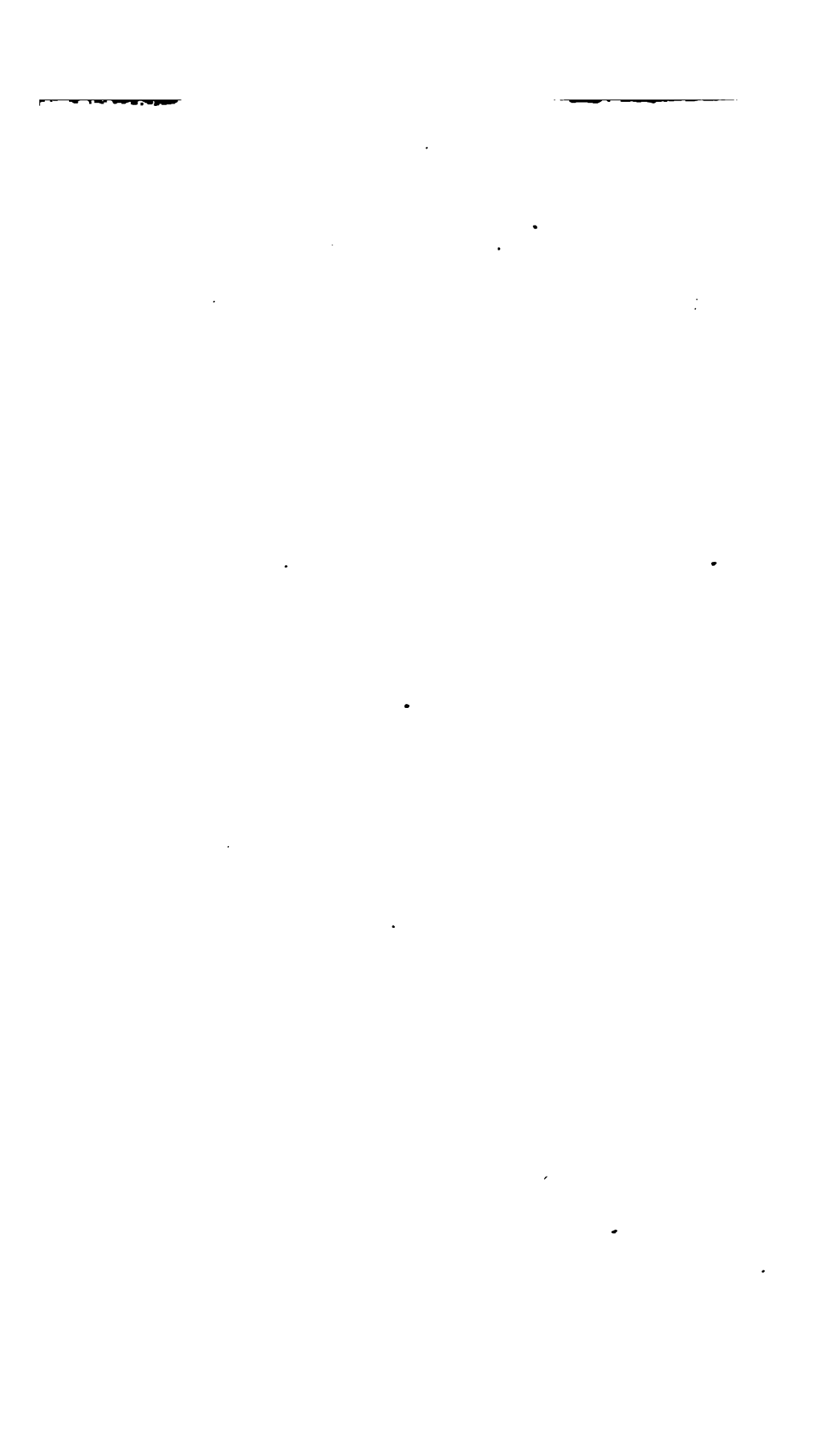
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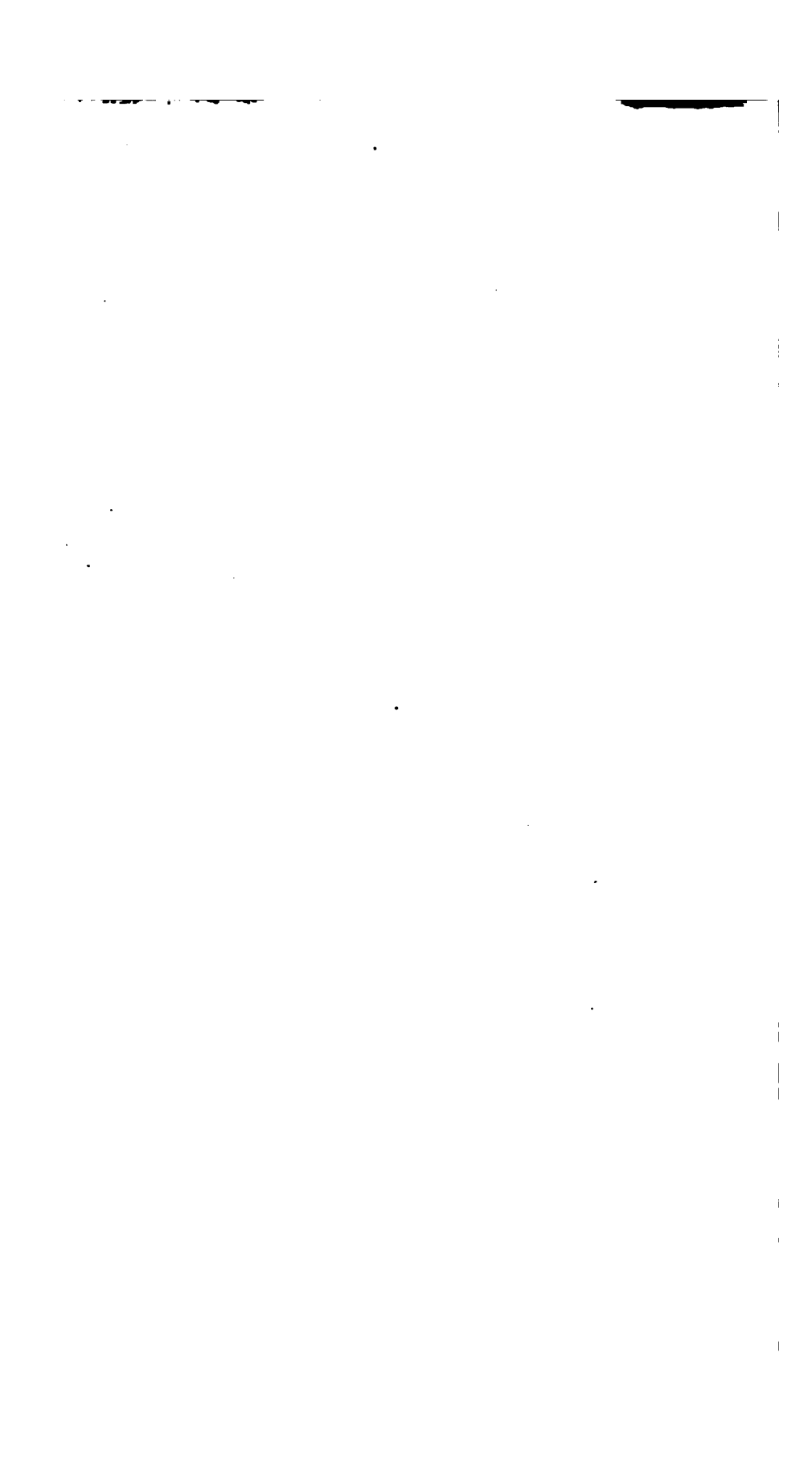
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